No. 5906

United States
Circuit Court of Appeals
For the Ninth Circuit.

16

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation,

Appellant,

vs.

A. G. COL COMPANY, INC., a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

REDMAN, ALEXANDER & BACON, Esqs., 333 Pine Street, San Francisco, California,
Attorneys for Appellant.

SIMEON E. SHEFFEY, Esq., Standard Oil Building, San Francisco, California,
Attorney for Appellee.

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 18,064.

A. G. COL COMPANY, INC., a Corporation,
Plaintiff,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation,
Defendant.

COMPLAINT UPON BOND.

Plaintiff complains of defendants above named, and for cause of action alleges:

I.

That A. G. Col Company, Inc., is and was at all times herein mentioned, a corporation organized and existing under and by virtue of the laws of the

State of California, and having its principal place of business in the city of San Jose, county of Santa Clara, State of California.

II.

That the Fidelity and Deposit Company of Maryland is and was at all of the times herein mentioned, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and authorized to do business, and at all times herein mentioned is and was doing business, in the State of California, and authorized by law to act and become a surety for the performance of acts and obligations, and having a place of business in the city and county of San Francisco, State of [1*] California.

III.

That California Sweet Potato Corporation is and was at all the times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Delaware and authorized to do business in the State of California, having its principal place of business at the city of Turlock, county of Stanislaus, State of California.

IV.

That A. G. Col Company, prior to the 1st day of January, 1923, was a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the city of San Jose, county of Santa

*Page-number appearing at the foot of page of original certified Transcript of Record.

Clara, State of California. That on or about the 1st day of December, 1922, the said A. G. Col Company agreed to transfer all its assets, real and personal, to the A. G. Col Company, Inc., and prior to the happening of all the acts herein mentioned had in fact transferred all its assets to the said A. G. Col. Company, Inc., except the said A. G. Col Company had not executed a deed to the hereinafter described real estate to the A. G. Col Company, Inc. That by the said agreement the said A. G. Col company promised and agreed for a valuable consideration to deed the said real property hereinafter described to the A. G. Col Company, Inc.

V.

That during all the times herein mentioned the A. G. Col Company, Inc., was the owner and entitled to the possession of a certain wholesale fruit and produce business, a certain warehouse and commission business, together with trucks, delivery wagons and a general stock in trade situated on the west *side* [2] *city* of San Jose, county of Santa Clara, State of California, and was the owner of and entitled to a conveyance from the A. G. Col Company of the following described real estate, on which the said business was located. The said real estate being that certain piece or parcel of land lying and being in the city of San Jose, county of Santa Clara, State of California, and more particularly described as follows, to wit:

BEGINNING at the westerly line of Market Street where the northerly line of St. James

Street intersects the same, running thence westerly along the northerly line of St. James Street, 192.9 feet to the easterly line of San Pedro Street, thence northerly along the easterly line of San Pedro Street 100 feet, thence easterly at right angles 192.9 feet to the westerly line of Market Street, thence southerly and along the westerly line of Market Street 100 feet to the point of beginning, together with all improvements thereon and appurtenances thereunto belonging.

VI.

That on or about the 30th day of June, 1925, plaintiff was in possession of the said business, together with all the trucks, delivery wagons, stock in trade and goodwill of the said business, and was engaged in conducting and carrying on a general wholesale fruit and produce business and a warehouse and commission business at the place above described and during said time plaintiff had a large established, growing and prosperous business and was receiving therefrom large profits and income.

VII.

That on or about the 15th day of June, 1925, the California Sweet Potato Corporation commenced an action against this plaintiff and certain other persons in the Superior Court of the State of California, in and for the county of Santa Clara, wherein the said California Sweet Potato Corporation was the sole plaintiff, and this plaintiff, A. G. Col Company, [3] Inc., was one of the defend-

ants, a copy of the complaint is hereto annexed, marked Exhibit "A," and made a part hereof.

VIII.

That on or about the 9th day of October, 1925, E. L. Jewett, Mable Jewett, L. E. Bontz and R. K. Bontz, moved the Superior Court of the State of California, in and for the county of Santa Clara for an order of change of venue to the city and county of San Francisco, in the said action then pending before the said Superior Court of Santa Clara County. That on said date said motion for change of venue was granted, and the said matter was transferred by the said Superior Court of Santa Clara County to the City and County of San Francisco, where said matter is now pending, and is Action No. 171,790. That plaintiff above-named has procured from the said Superior Court of the State of California, in and for the city and county of San Francisco, where the said action is now pending, an order of the said Court, authorizing this plaintiff in this said action, to maintain and prosecute a suit upon the bond filed by the said A. G Col as receiver in the said action pending before the said Superior Court of the city and county of San Francisco, in accordance with the provisions of Section 982 of the Political Code of the State of California.

IX.

That in said action the said California Sweet Potato Corporation alleged itself to be the owner of the said business and real estate hereinabove

described, basing said ownership upon the alleged ground that said business had been purchased with property alleged to have belonged to the said California Sweet Potato Corporation and in the said complaint further sought to obtain an order for the appointment of a receiver to [4] take charge and possession of said business and real estate hereinabove described and to collect the rents, issues and profits thereof, and to carry on the said business then and there being carried on and conducted by this plaintiff, and to take and retain possession thereof until the final determination of said action.

X.

That on or about the 30th day of June, 1925, the said California Sweet Potato Corporation applied to the said Superior Court of the State of California in and for the County of Santa Clara, for an order to be made *ex parte* appointing a receiver for the said business and real estate of plaintiff hereinabove described. That in order to secure the making of an order for the appointing of a receiver in said action and thereby securing the appointment of a receiver therein, defendant above named executed its certain bond or undertaking, a copy of which bond or undertaking is hereto annexed, marked Exhibit "B," and made a part hereof.

XI.

That prior to the making and giving of an order appointing a receiver in said action, and in order to secure the making and giving of such an order, the defendant herein, in consideration of the giving

and making of such an order and in order to enable the said plaintiff in said action to secure the same did execute the foregoing bond or undertaking and the said California Sweet Potato Corporation did on or about the 30th day of June, 1925, present the said bond or undertaking to the said Superior Court, and said bond or undertaking was on or about the 30th day of June, 1925, approved by the said Superior Court, and on said date and prior to the making of said order [5] of said Superior Court hereinafter mentioned, duly filed in the office of the Clerk of said Superior Court in the said action then pending.

XII.

That upon the filing of said bond or undertaking aforesaid, the said California Sweet Potato Corporation, plaintiff in said action, did procure in said action, and the said Superior Court in said action did give and make, its certain order appointing one A. G. Col receiver therein, and did direct said receiver to take possession of said business hereinabove described and directed the said receiver to collect the rents, issues and profits of the said business and retain possession thereof until further order of the said Superior Court, and further to carry on the said business then and theretofore carried on on said premises above described by this plaintiff, and did require and direct the plaintiff in this action and all persons holding any of their property for them, or either of them, and their agents, attorneys, servants and employees to surrender, turn over and deliver unto said receiver

and into his possession all the property of said business, including the books, papers, and accounts of said business immediately upon the service of a copy of said order.

XIII.

That thereafter, and on the 30th day of June, 1925, the said A. G. Col duly qualified as such receiver, and on said 30th day of June, 1925, as such receiver did demand and take from this plaintiff the possession of all of the said property and business hereinabove described and from said date to and including the 2nd day of July, the said A. G. Col remained in exclusive possession of the said business and the whole thereof, [6] and managed and conducted said business and excluded this plaintiff therefrom.

XIV.

That said California Sweet Potato Corporation, the plaintiff in said action, did wrongfully and without sufficient cause procure the appointment of the said receiver in said action, and the said order appointing the said receiver was, on or about the 7th day of August, 1925, by the Supreme Court of the State of California, vacated and annulled.

XV.

That none of the other defendants in the said action before the said Superior Court suffered damage by reason of the appointment of the said receiver by the said Superior Court.

XVI.

That by reason of the appointment of the said

receiver as aforesaid and the entry by him upon his duties as such, and the taking of the said business and property out of the possession of this plaintiff, and the exclusion of this plaintiff from the possession and control and management of said business, plaintiff suffered damage as follows:

By loss of actual profits to the said business in the sum of five thousand ($5,000) dollars; by loss of the credit and goodwill of said business in the sum of five thousand ($5,000) dollars.

XVII.

That in order to procure the vacation and annullment of the said order, this plaintiff was compelled to pay, and did pay to Simeon E. Sheffey, its attorney in the said matter, the sum of fifteen hundred ($1500) dollars, and was compelled to pay, and did pay out, moneys as necessary costs and expenses, to [7] procure the vacation and annullment of the said order in the sum of two hundred and fifty ($250) dollars; that the sums paid to Simeon E. Sheffey, as attorneys' fees, are and were a reasonable sum as said attorneys' fees in the said matter; that the said sum of two hundred and fifty ($250) dollars, paid out as court costs and expenses in the said matter were and are a reasonable sum.

XVIII.

That no part of said sums have been paid.

WHEREFORE, plaintiff prays:

Judgment against defendant above named, for the sum of five thousand ($5,000) dollars, together with interest on the said sum from the 30th day of

June, 1925, together with its costs of this suit, herein incurred.

SIMEON E. SHEFFEY,
Attorney for Plaintiff.

State of California,
City and County of San Francisco.

E. L. Jewett, being first duly sworn, deposes and says:

That he is an officer of the A. G. Col Company, Inc., a corporation, plaintiff above named, and as such officer is authorized to make this verification on behalf of said plaintiff; that he has read the foregoing complaint; that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

E. L. JEWETT.

Subscribed and sworn to before me this 10 day of ~~October,~~ 1927.
December,

[Seal] FLORA HALL,
Notary Public in and for the City and County of San Francisco, State of California. [8]

EXHIBIT "A."

In the Superior Court of the State of California in and for the County of Santa Clara.

CALIFORNIA SWEET POTATO CORPORATION, a Corporation,

Plaintiff,

vs.

L. E. BONTZ, C. W. HUNT, R. K. BONT, E. L. JEWETT, MABLE JEWETT, J. C. JEWETT, JOSEPH HUNT, GRANT J. HUNT, A. G. COL COMPANY, a Corporation, A. G. COL COMPANY, INC., a Corporation, First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe, Sixth Doe, Seventh Doe,

Defendants.

COMPLAINT.

Plaintiff complains of defendants, and for cause of action alleges:

I.

That the plaintiff is now and during all the times herein mentioned has been a corporation organized and existing under and by virtue of the laws of the State of Delaware, and transacting business in the State of California, with a capital stock of 10,000 shares, divided as follows: 3,500 shares, par value One Hundred ($100) Dollars each of preferred stock, and 4,500 shares, par value One Hundred ($100) Dollars each of Class "A" Common stock,

and 2,000 shares Class "B" Common stock of no par value, and has complied with the laws of the State of California by filing a certified copy of its Articles of Incorporation with the Secretary of State of the State of California and with the County Clerk of the county of Stanislaus.

II.

That the defendants, A. G. Col Company and A. G. Col Company, Inc., are corporations organized and existing under and by virtue of the laws of the State of California, and having their principal place of business in the county of Santa Clara, State of California; and [9]

That the defendants, E. L. Jewett and Mable Jewett are husband and wife;

That the true names of First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe, Sixth Doe and Seventh Doe are not known to this plaintiff, and it asks that when their names be ascertained, that the pleadings and papers in this cause be amended so as to set forth their true and proper names.

III.

That from April 24th, 1922 to May 4th, 1923 the defendants, L. E. Bontz, C. W. Hunt and one R. A. Bronson, were the directors of the California Sweet Potato Corporation, the plaintiff herein; and during that period L. E. Bontz was the president, R. K. Bontz, the secretary, and C. W. Hunt, the vice-president thereof.

That on or about August 22d, 1922 the said officers of this plaintiff, except director, R. A. Bron-

son, purchased all of the capital stock of the defendant, A. G. Col Company, a corporation, and all of its property and assets consisting chiefly of that certain piece or parcel of land situate, lying and being in the city of San Jose, county of Santa Clara, State of California, and bounded and described as follows, to wit:

Beginning at the Westerly line of Market Street where the Northerly line of St. James Street intersects same; running thence Westerly along the Northerly line of St. James Street 192.90 feet to the easterly line of San Pedro Street; running thence Northerly along the Easterly line of San Pedro Street 100 feet; running thence at right angles Easterly 192.90 feet to the Westerly line of Market Street; running thence Southerly and along the Westerly line of Market Street 100 feet to the point of beginning, together with improvements thereon, and personal property consisting chiefly of:

A wholesale Fruit & Produce, Warehouse and Commission Business, trucks and delivery wagons, and goods, wares and merchandise on said premises, all of which were then, and are now of great value.

That in acquiring said property the said defendants issued [10] 200 shares of the preferred treasury stock of this plaintiff, and 200 shares of Class "A" Common treasury stock of this plaintiff, all of the par value of Forty Thousand ($40,000) Dollars, to the former owners of the capital stock of said A. G. Col Company, for the said property, as payment for same, and thereupon wrong-

fully and without any right converted the same to their own use and took possession of said property.

IV.

That on or about the 23d day of November, 1922, all the defendants herein, without any right or authority from this plaintiff organized a new corporation, under the name and style of A. G. Col Company, Inc., and that said defendants without any consideration paid to this plaintiff and with the view and for the purpose of cheating and defrauding this plaintiff of its said property, turned over the said Wholesale Fruit & Produce, Warehouse and Commission business to said last-named corporation of A. G. Col Company, Inc., and said last-named corporation through its officers and employees have been, and now are managing, conducting and operating said business and enterprise without the consent and against the will of this plaintiff, all to the detriment to this plaintiff and as a source of income and profit to said defendants.

V.

This plaintiff is informed and believes, and upon such information and belief alleges the facts to be that on or about August 22, 1922, other than R. A. Bronson, the then officers of this plaintiff, and the other defendants herein entered into a conspiracy to cheat and defraud this plaintiff of the property set forth and described in this complaint, and did actually take possession of said property, and have ever since been and are now in the possession and

control thereof, and have converted said property to their own use. [11]

That part of the scheme and conspiracy of said defendants in depriving this plaintiff of its said property consisted of:

(a) In keeping said transaction secret and not reporting same to the stockholders thereof.

(b) Of not listing said property as part of the assets of the plaintiff.

(c) And said defendants also organized the defendant A. G. Col Company, Inc., and are now operating and controlling said property under and in the name of said A. G. Col Company, Inc., without the consent and against the wishes of this plaintiff.

VI.

This plaintiff is informed and believes, and upon such information and belief, avers the facts to be that all of said defendants are the officers, or employees of, and also claim to be the owners and holders of all of the issued capital stock of said A. G. Col Company, Inc.

That said defendants also claim to be the officers, agents and employees of the A. G. Col Company, and claim to be the owners and holders of all of the issued and outstanding stock of said corporation, while in truth and in fact all of said stock belongs to this plaintiff.

VII.

That this plaintiff has demanded the possession of said property and an accounting from said defendants and they have refused to surrender the possession of said property and to render any ac-

counting of the management and operation of said business and enterprise.

VIII.

That in August, 1924, some of the present officers and directors of this plaintiff were elected and placed in office and that the said acts and conduct of the former directors and officers of [12] this plaintiff were not discovered or in any manner made known to the present officers of the plaintiff until April, 1925.

IX.

This plaintiff is informed and believes, and upon such information and belief, alleges: That said defendants threaten to sell and dispose of all of the property hereinabove described, and that on March 31, 1925, they encumbered same to the extent of $20,000 and upwards, and unless restrained by an order of this Court they will sell and dispose of said property or further encumber same and make it impossible for this plaintiff to secure possession and control of said property in as good condition as same is now.

That it will be extremely difficult, if not impossible, to figure or calculate the amount of damage the plaintiff will suffer and sustain if said title is disposed of or further encumbered, and it is necessary that a receiver be appointed to take charge of and manage the said Wholesale Fruit & Produce, Warehouse and Commission business in order to properly preserve and protect the rights and interests of this plaintiff.

X.

Plaintiff is informed and believes, and upon such information and belief, avers the fact to be that the defendant, A. G. Col Company, Inc., never had, or possessed any real capital or assets and is a dummy organization used by the individual defendants herein for the purpose of concealing their operations, and that said corporation is in imminent danger of insolvency.

XI.

That said former officers of this plaintiff did not keep proper books of account, and have not accounted for, in cash or property, for a large amount of the capital stock of this plaintiff [13] issued by them, the exact amount of which is unknown to this plaintiff, and this plaintiff is informed and believes, and upon such information and belief, avers the facts to be that the par value of said stock not accounted for amounts to more than Sixty Thousand ($60,000) Dollars, and that each and all of the individual defendants herein, including the fictitious defendants, are and were beneficiaries of the said irregularities of said officers in the issuing of said stock.

WHEREFORE, plaintiff prays the decree of this court:

1. That it be adjudged and decreed that said defendants hold all of said property in trust for this plaintiff, and that it be declared that this plaintiff is the real owner thereof, and said defendants be required to deliver same to this plaintiff.

2. That defendants, and each of them, be required to give and render an accounting of the management and operation of the Wholesale Fruit & Produce, Warehouse & Commission business from August 22, 1922, up to date of rendering of said account.

3. That said defendants be required to give and render a full and complete account of all of their transactions respecting the issuance of the capital stock of this plaintiff.

4. That a receiver be appointed to take charge of the said Wholesale Fruit & Produce, Warehouse & Commission business with ample authority to manage and operate same under the orders of this Court until the final judgment in this action.

5. That said defendants, and each of them, be restrained and enjoined from disposing of any of said property or of encumbering the title thereto, or of transferring any of the capital stock of said A. G. Col Company, a corporation, or of encumbering the title thereto. That the defendants be required to turn over and deliver to this plaintiff all of the capital stock of said A. G. Col Company, [14] a corporation, and all of the property owned by it on August 22, 1922.

6. Plaintiff prays for general relief and such other remedies as may seem meet and agreeable to equity, together with costs of this action.

W. E. FOLEY and
N. E. WRETMAN,
Attorneys for Plaintiff.

State of California,
County of Santa Clara,—ss.

Charles Morris, being first duly sworn, deposes and says: That he is an officer of the plaintiff named in the above and foregoing complaint, to wit: The manager of said corporation; that he has been such manager during the five months last past; that he has read the complaint on file herein and knows the contents thereof, and that the facts therein stated are true of his own knowledge, except as to matters stated therein upon information and belief, and as to those matters he believes the same to be true; that the president and secretary of said corporation are both absent from the County of Santa Clara, and this affidavit is made for and in behalf of said plaintiff and this affiant is more familiar with the facts stated in said complaint than either the president or secretary thereof.

CHARLES MORRIS.

Subscribed and sworn to before me this 15th day of June, 1925.

[Seal] N. E. WRETMAN,
Notary Public in and for the County of Santa Clara, State of California. [15]

EXHIBIT "B."

In the Superior Court of the State of California in and for the County of Santa Clara.

No. 31,959.

CALIFORNIA SWEET POTATO CORPORATION, a Corporation,

Plaintiff,

vs.

L. E. BONTZ, et al.,

Defendants.

BOND OF RECEIVER.

KNOW ALL MEN BY THESE PRESENTS, That we, A. G. Col. principal, and Fidelity and Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland, and duly authorized to transact a general surety business in the State of California, as Surety, are held and firmly bound unto the State of California in the sum of five thousand ($5,000.00) dollars to be paid to said State of California, for which payment well and truly to be made, we and each of us bind ourselves, jointly and severally, and our respective heirs, executors and administrators firmly by these presents.

WHEREAS, by an order of the Superior Court of the State of California in and for the County of Santa Clara made on the 30th day of June, 1925, in an action therein pending wherein the Califor-

nia Sweet Potato Corporation, a corporation, is plaintiff and L. E. Bontz, C. W. Hunt, R. K. Bontz, E. L. Jewett, Mable Jewett, J. C. Jewett, Joseph Hunt, Grant J. Hunt, A. G. Col Company, a corporation, A. G. Col Company, Inc., a corporation, First Doe, Second Doe, Third Doe, Fourth Doe, Sixth Doe and Seventh Doe are defendants. It was among other things ordered that the above-bounded A. G. Col be appointed receiver of the property described in complaint in said cause, consisting briefly [16] of: Wholesale fruit and produce, Warehouse and commission business, trucks and delivery wagons, and goods, wares and merchandise on the premises situate on the west side of St. James Street, between Market and San Pedro Streets, in San Jose, Santa Clara County, California, with the usual powers and duties of receivers as set forth in said order, and that he be vested with all rights and powers as such receiver upon filing a bond for the faithful performance of his duties in the penal sum of five thousand ($5,000.00) dollars.

NOW, THEREFORE, the condition of this obligation is such that if the said A. G. Col and said Surety, their heirs, executors and administrators, or any of them, shall well and truly pay to the defendants, or either of them, all damages that all, or either of them, may sustain by reason of the appointment of said receiver and entry by him upon his duties in case the applicant shall have procured said appointment wrongfully, maliciously, or without just cause, and the said receiver shall faith-

fully perform all of his duties as such receiver, then the above obligation to be void, otherwise to remain in full force and effect.

A. G. COL. (Seal)

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

By M. E. PAGE,
Attorney-in-fact.

State of California,
County of Santa Clara,—ss.

On this 30th day of June, A. D. 1925, before me, N. E. Wretman, a Notary Public in and for the said County of Santa Clara personally appeared M. E. Page, Attorney-in-fact for the Fidelity and Deposit Company of Maryland, to me personally known to be the individual described in and who executed the within instrument, and he acknowledged the execution of the same, and being by me duly sworn, deposeth and saith, that he is the said Attorney-in-fact [17] of the company aforesaid, and that the seal affixed to the within instrument is the corporate seal of the said Company, and that the said corporate seal and his signature as such Attorney-in-fact were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in

the City of San Jose, State of California, the day and year first above written.

N. E. WRETMAN,

Notary Public in and for Said County of Santa Clara, State of California.

[Endorsed]: Filed December 21st, 1927. [18]

[Title of Court and Cause.]

DEMURRER TO COMPLAINT AND MOTION TO MAKE MORE DEFINITE AND CERTAIN.

Comes now the defendant and demurs unto the complaint upon the following grounds.

1. That said complaint does not state facts sufficient to constitute a cause of action.

2. That there is a defect of parties defendant in that A. G. Col has not been made a party to the action.

3. That there is a defect of parties defendant in that California Sweet Potato Corporation has not been made a party to the action.

4. That there is a defect of parties plaintiff in that all of the defendants in the action in which the receiver was appointed have not been made parties to this action.

5. That the complaint is uncertain in the following particulars:

(a) It cannot be ascertained therefrom if the

appointment of the receiver was obtained wrongfully or maliciously or without just cause. [19]

(b) It cannot be ascertained therefrom if the Court had jurisdiction to appoint the receiver.

(c) It cannot be ascertained therefrom in what respect the recever failed to perform his duties as receiver.

(d) It cannot be ascertained therefrom wherein the plaintiff has sustained any legal damage.

(e) It cannot be ascertained therefrom how the plaintiff can recover upon a bond payable to the State of California.

(f) It cannot be ascertained therefrom whether prior to the commencement of this action there was an accounting by the receiver and a loss established by the Court.

(g) It cannot be ascertained therefrom whether prior to the commencement of this action the receiver was called to account and directed to pay the alleged loss.

6. That said complaint is ambiguous in the same respects in which it is stated to be uncertain.

7. That said complaint is unintelligible in the same respects in which it is stated to be uncertain.

WHEREFORE, defendant prays to be hence dismissed with its costs.

REDMAN & ALEXANDER,
Attorneys for Defendant.

MOTION TO MAKE MORE DEFINITE AND CERTAIN.

Defendant above named moves the above-entitled court for an order directing the above-named plaintiff to make its complaint more definite and certain in all of the respects set forth in the foregoing demurrer as grounds of uncertainty, ambiguity and unintelligibility.

REDMAN & ALEXANDER,
Attorneys for Defendant.

Receipt of a copy of the within demurrer and motion admitted this 30th day of December, 1927.

SIMEON E. SHEFFEY,
Attorney for Plaintiff.
By J.

[Endorsed]: Filed Jan. 3, 1928. [20]

District Court of the United States, Northern District of California, Southern Division.

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Thursday, the 12th day of April, in the year of our Lord one thousand nine hundred and twenty-eight. Present: the Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

MINUTES OF COURT—APRIL 12, 1928—ORDER OVERRULING DEMURRER TO COMPLAINT AND DENYING MOTION TO MAKE MORE CERTAIN.

Defendant's demurrer to complaint and motion to make more certain, heretofore heard and submitted, being now fully considered, IT IS ORDERED that said demurrer be and the same is hereby overruled and that said motion be and the same is hereby denied, with leave to defendant to answer within ten days. [21]

[Title of Court and Cause.]

AMENDED ANSWER TO COMPLAINT.

Comes now the defendant and by leave of Court first had and obtained files its amended answer to the complaint and denies and alleges as follows:

1. Said defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph I of the complaint and therefore and upon that ground denies each and every allegation in said paragraph contained.

2. Said defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph III of the complaint and therefore and

upon that ground denies each and every allegation in said paragraph contained.

3. Said defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph IV of the complaint and therefore and upon that ground denies each and every allegation in said paragraph contained.

4. Said defendant alleges that it has no information [22] or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph V of the complaint and therefore and upon that ground denies each and every allegation in said paragraph contained.

5. Said defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph VI of the complaint and therefore and upon that ground denies each and every allegation in said paragraph contained.

6. Said defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations in Paragraph VII of the complaint and therefore and upon that ground denies each and every allegation in said paragraph contained.

7. Denies that the plaintiff has procured from the said Superior Court of the State of California, in and for the city and county of San Francisco, where said action was alleged to be pending, or from any court, an order of said Court authorizing the plaintiff in this action to maintain and/or

prosecute a suit upon the bond filed by the said A. G. Col as receiver in said action pending before the Superior Court in the city and county of San Francisco, in accordance with the provisions of Section 982 of the Political Code of the State of California, or otherwise; in that behalf defendant alleges the true fact to be that the alleged order was and is void and of no legal or any force or effect; and that said alleged order was obtained without notice to the defendant and without any opportunity to defendant to be heard upon said matter, or have its day in court thereon, nor did the defendant or its attorneys know or have notice of [23] any proceeding to obtain the alleged order until long after said alleged or purported order had been made; nor did the defendant or its attorneys know of said order or know of any proceeding to obtain the said order until after the above-entitled action had been commenced.

8. Said defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph IX of the complaint and therefore and upon that ground denies each and every allegation in said paragraph contained.

9. Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph X of the said complaint and therefore and upon that ground denies each and every allegation in said paragraph contained, excepting said defendant admits that it signed the alleged bond but for the rea-

sons hereinafter set forth alleges that said bond was and is null and void and of no force or effect.

10. Defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph XI of the complaint and therefore and upon that ground denies each and every allegation in said paragraph contained, excepting said defendant admits that it signed the alleged bond but for the reasons hereinafter set forth alleges that said bond was and is null and void and of no force or effect.

11. Defendant denies that upon the filing of the alleged bond or undertaking the said California Sweet Potato Corporation, plaintiff in said action, did procure in said action and/or the Superior Court in said action did give and/or make a certain order appointing one A. G. Col, Receiver and/or did direct said [24] Receiver to take possession of said business described in the complaint and/or directed the said receiver to collect the rents and/or issues and/or profits of said business and/or retain possession thereof until further order of said Superior Court, and/or further or at all to carry on said or any business then and/or theretofore carried on on said premises described in the complaint by the plaintiff; and/or did require and/or direct plaintiff in this action and/or all persons or any person holding any of their property for them or either of them and/or their agents, attorneys, servants and employees, or either or any thereof, to surrender and/or turn over and/or deliver unto said receiver and/or into his possession all or any of the prop-

ergy of said business, including the books and or papers and or accounts or any thereof of said business immediately upon the service of a copy of said order; and in that behalf defendant alleges the true fact to be that each and all of said alleged orders were and are null and void, and that each of said alleged orders was and is void and of no force or effect; and that the Court purporting to make said orders had no jurisdiction or legal power to do so, and that by reason of said lack of jurisdiction or power of the Court to make said orders or any thereof, each and all of said orders is and are null and void and of no force or effect.

12. Defendant denies that thereafter and/or on the 30th day of June, 1925, or at any time or at all, said A. G. Col duly or at all qualified as such receiver, and/or on said 30th day of June, 1925, or at any time, as such receiver did demand and/or take from this plaintiff possession of all or any of said property and/or business described in the complaint; and in that behalf alleges the true fact to be that the court did not have jurisdiction or power to appoint said A. G. Col receiver and that [25] the alleged order purporting to appoint him receiver was and is null and void and of no force or effect; and denies that said A. G. Col from said date to and/or including July 2d, or any time, remained in the exclusive or any possession of said business and/or the whole or any thereof and/or managed and or conducted said business and/or excluded the plaintiff therefrom.

13. Defendant denies that said California Sweet

Potato Corporation did wrongfully, and/or without sufficient cause, procure the appointment of said alleged receiver in the alleged action.

14. Said defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph XV of the complaint and therefore and upon that ground denies each and every allegation in said paragraph contained.

15. Denies that by reason of the alleged appointment of the receiver and/or the entry by him upon his duties, or any duty, as such and/or the taking of said business and/or property out of the possession of the plaintiff and/or the exclusion of plaintiff from the possession and/or control and/or management of said business or for any reason plaintiff suffered damage by loss of actual profits or actual or any profit or profits to said business in the sum of five thousand ($5,000.00), or any sum and/or by reason of the loss of credit and/or goodwill of said business in the sum of five thousand ($5,000.00) dollars or any sum or that said plaintiff has sustained injury or loss or damage in any sum or amount for any reason whatsoever.

16. Said defendant alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations contained in Paragraph XVII of the complaint and therefore and upon that ground denies each and every allegation [26] in said paragraph contained.

17. Upon the same ground defendant denies that no part of the said sums have been paid.

18. Further answering said complaint and as a separate defense thereto defendant alleges that the receiver named therein accounted to the Superior Court of the county of Santa Clara by which he was appointed and his accounts as such receiver were settled, allowed and approved and no shortage was found therein, nor was any loss or damage ascertained by said Court.

19. Further answering said complaint and as a separate defense thereto, defendant alleges that the receiver named therein has never been cited to account in the Superior Court, nor has any shortage been found or established in his accounts, nor any loss or damage ascertained.

20. Further answering said complaint and as a separate defense thereto said defendant alleges that the bond referred to therein is payable to the State of California and further alleges that no valid order of Court was secured or obtained by the plaintiff or anyone permitting the prosecution of the above-entitled action for the benefit of the plaintiff.

21. Further answering said complaint and as a separate defense thereto defendant alleges that the bond therein referred to was and is null and void and of no force or effect and alleges that the Court purporting to appoint the receiver had no jurisdiction or legal power to do so or to direct the giving of any bond and that the alleged orders purporting to do so were and are null and void and were in excess of the Court's jurisdiction and that the alleged bond was and is null and void and of no force or effect. [27]

22. Further answering said complaint and as a separate defense thereto, defendant alleges that the appointment of the alleged receiver therein referred to was not procured wrongfully or maliciously or without just cause and that said receiver faithfully performed all of his duties as such receiver.

23. Further answering said complaint and as a separate defense thereto, defendant alleges that prior to the commencement of the above-entitled action, in a suit pending in the above-entitled court and bearing the same title, and between the parties to this action, and numbered 18,013, the matters set forth in the complaint in the above-entitled action were decided and adjudged and judgment was therein entered in favor of the defendant, and that said judgment is a final one and was at the time of the commencement of the above-entitled action and still is in full force and effect, and that pursuant to said judgment it was ordered, adjudged and decreed that plaintiff take nothing by the action and that the defendant have judgment for its costs.

WHEREFORE, defendant prays to be hence dismissed with its costs.

REDMAN & ALEXANDER,
Attorneys for Defendant. [28]

State of California,
City and County of San Francisco,—ss.

Guy Leroy Stevick, being first duly sworn, deposes and says: That he is an officer of the above-named defendant, to wit, the vice-president thereof, and as such is authorized to make this verification

on its behalf; that he has read the foregoing amended answer and knows the contents thereof and that the same is true of his own knowledge, save as to the matters therein stated on information or belief, and as to such matters, he believes it to be true.

GUY LEROY STEVCK.

Subscribed and sworn to before me this 7th day of June, 1928.

[Seal] HENRIETTA HARPER,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Receipt of a copy of the within amended answer admitted this 14th day of June, 1928.

SIMEON E. SHEFFEY,
Attorney for Plaintiff.

Filed June 15th, 1928. [29]

District Court of the United States, Northern District of California, Southern Division.

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Thursday, the 4th day of April, in the year of our Lord one thousand nine hundred and twenty-nine. Present: The Honorable FRANK H. KERRIGAN, District Judge.

[Title of Cause.]

MINUTES OF COURT—APRIL 4, 1929—TRIAL.

The trial of this case was this day resumed, the parties and the jury being present as heretofore. E. M. Rosenthal, A. G. Col, Joseph P. Napoli, Frank C. Napoli and Ray Col were sworn and testified on behalf of defendant. Carl S. Park and S. E. Sheffey, were recalled and further testified on behalf of defendant, and defendant rested. Attorneys for the defendant thereupon moved the Court for a directed verdict in favor of the defendant and against the plaintiff and after hearing said motions, the Court ordered said motions denied and exception entered thereto. After argument the Court instructed the jury, who retired to deliberate upon a verdict at 3:40 o'clock P. M., and subsequently returned into court at 4:30 P. M., and the jury being complete, the jury in answer to the question of the Court, stated they had agreed upon a verdict, and presented a written verdict which the Court ORDERED filed and recorded, viz: "We, the jury in the above-entitled case find in favor of the plaintiff and assess the damages against the defendant in the sum of six thousand three hundred ($6,300.00) dollars. Paul A. Sinsheimer, Foreman." ORDERED that judgment be entered herein in accordance with said verdict, and that execution of judgment be stayed for a period of thirty days. Thereupon the Court ORDERED the jurors dis-

charged from further consideration of this case. [30]

[Title of Court and Cause.]

VERDICT.

We, the jury in the above-entitled case, find in favor of the plaintiff and assess the damages against the defendant in the sum of six thousand three hundred ($6,300.00) dollars.

PAUL A. SINSHEIMER,
Foreman.

[Endorsed]: Filed April 4, 1929, at 4:30 P. M. [31]

In the Southern Division of the United States District Court for the Northern District of California.

No. 18,064.

A. G. COL COMPANY, INC., a Corporation,
Plaintiff,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation,
Defendant.

JUDGMENT ON VERDICT.

This cause having come on regularly for trial on the 3d day of April, 1929, before the Court and a

jury of twelve men duly impaneled and sworn to try the issues joined herein; S. E. Sheffey and Alden Ames, Esqrs., appearing as attorneys for plaintiff, and Jewell Alexander, Esq., appearing as attorney for defendant, and the trial having been proceeded with on the 4th day of April, in said year and term, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court having been submitted to the jury, and the jury having subsequently rendered the following verdict, which was ORDERED recorded, namely: "We, the jury, in the above-entitled case find in favor of the plaintiff and assess the damages against the defendant in the sum of six thousand three hundred ($6,300.00) dollars. Paul A. Sinsheimer, Foreman," and the Court having ORDERED that judgment be entered herein in accordance with said verdict:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that A. G. Col Company, Inc., a corporation, plaintiff, do have and recover of and from Fidelity and Deposit Company of Maryland, a corporation, defendant, the sum of six thousand three hundred ($6,300.00) dollars.

Judgment entered April 4th, 1929.

WALTER B. MALING,
Clerk. [32]

[Title of Court and Cause.]

NOTICE OF INTENTION TO MOVE FOR A NEW TRIAL.

To the above-entitled Court and to the Clerk thereof; and to the above-named plaintiff, and to Messrs. SIMEON E. SHEFFEY and/or ALDEN AMES, its attorneys; and to all other interested parties and their attorneys:

Notice is hereby given to you and to each of you that the defendant Fidelity and Deposit Company of Maryland, a corporation, intends to move the above-entitled Court for an order vacating and setting aside the verdict of the jury herein on the 4th day of April, 1929, and the judgment entered thereon, and to grant a new trial of the above-entitled action upon the following grounds:

1. Insufficiency of the evidence to justify the verdict.

2. That said verdict is against the law.

3. Errors in law occurring at the trial and excepted to by the defendant.

4. Excessive damages appearing to have been given under the influence of passion and prejudice.

5. Irregularity in the proceedings of the plaintiff by which the defendant was prevented from having a fair trial. [33]

6. Orders of the Court by which defendant was prevented from having a fair trial.

7. Accident or surprise which ordinary prudence could not have guarded against.

8. Irregularity in the proceedings of the jury by which the defendant was prevented from having a fair trial.

9. Misconduct of the jury.

10. Misconduct of the jury; that one or more of the jurors were induced to assent to the verdict by a resort to the determination of chance.

11. Irregularities in the proceedings of the Court by which the defendant was prevented from having a fair trial.

12. Newly discovered evidence material to the defendant which could not with reasonable diligence have been discovered and produced at the trial.

That said motion as to all of the aforesaid grounds will be made upon the minutes of the Court, and also upon affidavits.

REDMAN & ALEXANDER,
Attorneys for Defendant.

MOTION OF DEFENDANT FOR A NEW TRIAL.

To the above-entitled Court and to the Clerk thereof; and to the above-named plaintiff, and to Messrs. Simeon E. Sheffey and/or Alden Ames, its attorneys; and to all other interested parties and their attorneys:

Comes now the defendant Fidelity and Deposit Company of Maryland, a corporation, and moves the above-entitled Court for an order vacating and setting aside the verdict of the jury herein on the

4th day of April, 1929, and the judgment entered thereon, and granting a new trial of the above-entitled action [34] upon the following grounds:

1. Insufficiency of the evidence to justify the verdict.

2. That said verdict is against law.

3. Errors in law occurring at the trial and excepted to by the defendant.

4. Excessive damages appearing to have been given under the influence of passion and prejudice.

5. Irregularity in the proceedings of the plaintiff by which the defendant was prevented from having a fair trial.

6. Orders of the Court by which defendant was prevented from having a fair trial.

7. Accident or surprise which ordinary prudence could not have guarded against.

8. Irregularity in the proceedings of the jury by which the defendant was prevented from having a fair trial.

9. Misconduct of the jury.

10. Misconduct of the jury; that one or *more the* jurors were induced to assent to the verdict by a resort to the determination of chance.

11. Irregularities in the proceedings of the Court by which the defendant was prevented from having a fair trial.

12. Newly discovered evidence material to the defendant which could not with reasonable diligence have been discovered and produced at the trial.

That said motion will be made upon the minutes of the court, and also upon affidavits.

REDMAN & ALEXANDER,
Attorneys for Defendant.

Service of the within notice, motion and points and authorities admitted this 12th day of April, 1929.

SIMEON E. SHEFFEY,
Attorney for Plaintiff.

[Endorsed]: Filed April 13th, 1929. [35]

District Court of the United States, Northern District of California, Southern Division.

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the court room thereof, in the city and county of San Francisco, on Monday, the 29th day of April, in the year of our Lord one thousand nine hundred and twenty-nine. Present: The Honorable FRANK H. KERRIGAN, District Judge.

[Title of Court and Cause.]

MINUTES OF COURT—APRIL 29, 1929—ORDER GRANTING NEW TRIAL UNLESS JUDGMENT REDUCED.

After hearing attorneys for the respective parties, IT IS ORDERED that the motion for a new trial on the calendar this day be and the same is

hereby granted unless plaintiff consents in writing within five days, to the amount of the judgment herein being reduced from the sum of $6,300.00 to $5,200.00, with costs. [36]

(Title of Court and Cause.)

CONSENT OF PLAINTIFF TO REMITTANCE OF A PORTION OF VERDICT.

The plaintiff above named hereby consents that the verdict in the above-entitled cause may be reduced by order of the above-entitled Court to the sum of fifty-two hundred ($5200) dollars, and that a new verdict be entered as of the date of the original verdict, in the above-entitled cause, in favor of the plaintiff and against the defendant, for the said sum of fifty-two hundred ($5200) dollars and costs of suit herein incurred.

SIMEON E. SHEFFEY,
ALDEN AMES,
Attorneys for Plaintiff.

Approved:

A. G. COL COMPANY, Inc.,
Plaintiff.
By J. C. JEWETT,
Manager.
By MABLE M. JEWETT,
Secretary.

[Endorsed]: Filed May 4, 1929. [37]

[Title of Court and Cause.]

ORDER REMITTING PORTION OF VERDICT.

It appearing that the plaintiff above named has consented to the reduction of the verdict rendered in the above-entitled cause on April 4th, 1929, to the sum of fifty-two hundred ($5200) dollars and taxable costs, it is hereby

ORDERED: That the verdict of sixty-three hundred ($6300) dollars in favor of the plaintiff, A. G. Col Company, Inc., and against the defendant Fidelity and Deposit Company of Maryland, be, and the same is hereby, reduced in accordance with the aforesaid consent of the plaintiff herein, and that the verdict in said cause shall be in favor of the plaintiff, A. G. Col Company, Inc., and against the defendant, Fidelity and Deposit Company of Maryland, for the sum of fifty-two hundred ($5200) dollars, and it is

Further ORDERED: That a motion of defendant herein for a new trial of the [38] said cause be, and the same is hereby denied.

Done in open court, this 4th day of May, 1929.

FRANK H. KERRIGAN,
Judge.

[Endorsed]: Filed and entered, May 3d, 1929. [39]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 3d day of April, 1929, the above-entitled action came on regularly for trial before the above-entitled court and a jury, the Honorable Frank H. Kerrigan presiding, the plaintiff therein being represented by Simeon E. Sheffey, Esq., and Alden Ames, Esq., and the defendant being represented by Messrs. Redman and Alexander. Thereupon the following proceedings were had and taken:

TESTIMONY OF E. D. BRONSON, FOR PLAINTIFF.

E. D. BRONSON, Jr., called as a witness for the plaintiff, being duly sworn, testified as follows:

Direct Examination.

I was a director of the A. G. Col Company, which is a different company from the plaintiff in this action. I have the minute-book of the A. G. Col Company. The A. G. Col Company transferred its assets to the plaintiff in this [40] action as of date October 31, 1922.

TESTIMONY OF J. C. JEWETT, FOR PLAINTIFF.

J. C. JEWETT, called as a witness for the plaintiff, being duly sworn, testified as follows:

Direct Examination.

I began my employment with the A. G. Col Company, Inc., on the 1st of May, 1923, and was employed first as assistant manager, and later I became the manager of that company, and continued as manager until the 16th of January, 1928. The company was engaged in the wholesale produce business at Market and St. James Streets, San Jose, and on the 30th of June, 1925, was in possession of that business. Mr. A. G. Col came to the place of business of the A. G. Col Company, Inc., on the 30th of June, 1925, with a court order giving him possession of the business as receiver. He came directly to me and told me that he was in possession of the business, and took all of my keys, and he took possession of the business. I was served with a certified copy of the order appointing A. G. Col as receiver. The order reads as follows:

In the Superior Court of the State of California, in and for the County of Santa Clara.

No. 31,959.

CALIFORNIA SWEET POTATO CORPORATION,

Plaintiff,

vs.

L. E. BONTZ, C. W. HUNT, R. K. BONTZ, E. L. JEWETT, MABLE JEWETT, J. C. JEWETT, JOSEPH HUNT, GRANT J. HUNT, A. G. COL COMPANY, a Corporation, A. G. COL COMPANY, INC., a Corporation FIRST DOE, SECOND DOE, THIRD DOE, FOURTH DOE, FIFTH DOE, SIXTH DOE, SEVENTH DOE,

Defendants. [41]

Upon the summons and verified complaint in this action, and the affidavit of N. E. Wretman, and upon all of the papers and proceedings heretofore filed and served herein, and on motion of W. E. Foley, Counsel for plaintiff,

IT IS ORDERED that A. G. Col, of San Jose, California be and he is hereby appointed receiver of the property and enterprise described in the complaint in said action, consisting of a wholesale fruit and produce, warehouse and commission business, trucks, and delivery wagons, and goods, wares and merchandise on the premises situate on West St.

James Street between Market Street and San Pedro Street in the city of San Jose, county of Santa Clara, State of California, heretofore operated under the name of A. G. Col Company, and is now in possession of said defendants.

Upon the said A. G. Col executing, acknowledging and filing with the Clerk of this court a bond in the usual form to the State of California in the penal sum of $10,000.00 personal bond or $5,000 surety bond with a surety company authorized and qualified to issue bonds in the State of California, to be approved as to its form and manner of execution by this Court, and upon due qualification of said receiver.

IT IS FURTHER ORDERED that said A. G. Col, as receiver, be and he is hereby vested with all the usual powers and rights of receivers appointed by this court, and with the power to take, care for and keep possession of said property, books of account, books and papers relating to said enterprise, to collect debts and moneys [42] and generally to do such acts as may be ordered by the Court or be sanctioned by law.

IT IS FURTHER ORDERED that a copy of this order, and the affidavit of N. E. Wretman referred to herein, be served J. C. Jewett, the manager in charge of said enterprise, at the time said receiver takes possession of said property.

Dated, June 30th, 1925.

J. R. WELCH,
Judge.

(Testimony of J. C. Jewett.)

Mr. Col took all the keys from the employees, and appointed a night watchman, and proceeded to have the books audited, and took charge of the bank-book. He stopped payment on all outstanding checks. Prior to the appointment of Mr. Col as receiver checks of the corporation were signed by myself and Grant Hunt and these checks had been previously issued by A. G. Col Company, Inc., before the appointment of the receiver. One of these checks were payable to Holl, Hass & Bessie, a wholesale produce house in Los Angeles, with whom we were doing business prior to June 30th, 1925, buying from them. We were doing business with Holl, Hass & Bessie upon terms of 15 to 30 days credit, and after the receiver was appointed and the payment on these checks was stopped we were not able to buy from Holl, Hass & Bessie on it. We were doing business with M. Sanda, a produce grower, Japanese firm, receiving produce from him to be sold on consignment on a commission basis. Goods were placed in our care to be sold at the best market value for him and for which we were to receive a commission. After the payment on the check to M. Sanda was stopped we did not receive [43] goods from M. Sanda on consignment for several months. The A. G. Col Company, Inc. was doing business with C. E. Oka a firm who consigned goods to us on the same terms as M. Sanda. After the appointment of the receiver and the payment was stopped on the check to C. Oka we did not receive any further goods from

(Testimony of J. C. Jewett.)

C. Oka on consignment for a good while, I would say about 9 months." The check dated June 26, 1925, payable to Levi & Zentner was for goods bought on credit. Levi & Zentner are in the wholesale fruit and produce business in San Francisco. In June, 1925, we were doing business with Levi & Zentner buying principally on regular terms as employed in this market. We usually settled accounts with them weekly, but if not weekly we would settle on the 13th and 28th of the month. After payment was stopped on this check we were not able to buy goods from Levi & Zentner on the usual terms of credit. Eveleth Nash are a wholesale fruit and produce house on Front Street, San Francisco. We were buying produce from Eveleth Nash in June, 1925, on regular San Francisco market terms. After the receiver was appointed and payment on the check to Eveleth Nash was stopped, we were not able to buy goods from them upon the regular terms. The Panama Fruit & Produce Company is a wholesale fruit and produce company in San Francisco. A. G. Col Company, Inc., was doing business with that company, buying produce from them prior to June 30th, 1925, at the regular San Francisco market terms. After the receiver was appointed on the 30th day of June, 1925, and payment on the check to them was stopped we were not able to buy from the Panama Fruit & Produce Company on the usual San Francisco market terms. Jones & Pettigrew is a wholesale [44] fruit and produce house

(Testimony of J. C. Jewett.)

in San Francisco. Prior to June 30, 1925, the date on which the receiver was appointed and payment stopped on their check we were buying goods from this company on the regular market terms. After that we were not able to buy from that company on the usual San Francisco market terms. Cazzelli Bros. is a wholesale fruit and produce house in San Francisco. Prior to June 30th, 1925, we were doing business with that company on unlimited credit, that is as long as we desired, at least regular market terms. After the receiver was appointed on June 30, 1925, and payment stopped on their check we were not able to buy goods on credit from that firm. De Bac & Co. is a wholesale fruit and produce house in San Francisco. Prior to June 30th, 1925, we were doing business with this company on regular market terms. After June 30th, 1925, and payment was stopped on their checks we were not able to buy from them. That continued until my brother personally guaranteed the account two or three days following the receivership. De Matei & Co. are wholesale fruit and produce people in San Francisco. Prior to June 30th, 1925, the A. G. Col Company, Inc., was doing business with this company on regular market terms. After June 30th, 1925, and payment on this check was stopped, we were able to do business with them on a cash basis. C. Bracciotti, I judge, is one of the artichoke growers. W. A. Curtis was a wholesale fruit and produce house in San Francisco. Prior to June 30th, 1925, we were doing business

(Testimony of J. C. Jewett.)

with this firm at the regular San Francisco market terms. We were buying from them. After June 30th, 1925, the date when the payment on that check was stopped, we did business with them for cash. Prior to June 30th, 1925, we were doing business with the Halfmoon Bay Fruit & Produce Company [45] at San Francsco upon terms of unlimited credit. We were buying goods from them on it. After June 30th, 1925, and the date the payment was stopped on their check we could do business with them on a cash basis. Jack Bros. and McBurney are wholesale growers and shippers from Imperial Valley. Prior to June 30th, 1925, we were buying produce from this firm. After that date and after payment was stopped on this check, I was notified by Mr. Jack that anything that I got from them would come with draft attached to bill of lading, shipper's order. I never did establish credit with them again. Referring to the check dated June 30th, 1925, payable to the Mercantile Trust Company with the words "payment stopped" stamped across the face. The Mercantile Trust Company is a banking organization in San Jose. Mrs. Williams is a farmerette near Campbell. The A. G. Col Company, Inc., was doing business with her firm to June 30th, 1925, on a consignment basis. After June 30th, 1925, the date payment was stopped on this check, I paid her for her produce as she brought it in. The next check is No. 1066 in favor of F. Heimes with the words "payment stopped" stamped across the face. Prior to the

(Testimony of J. C. Jewett.)

appointment of the receiver we were buying and selling. This was a retail grocer. I do not know if we lost any business with him or not. He was always on the cash list. The next check is made to the order of P. Vierengo with the words "payment stopped" stamped across its face. Their check is dated June 24th, 1925, Mrs. R. E. Homsley, a check dated June 13th, payment stopped. She is a grower. We were receiving on consignment basis from her before, but after payment was stopped we did not receive any more consignments. These bank checks are all in payment of sight drafts that we paid the farmers with for merchandise. I am now referring [46] to a check dated June 30th, 1925, payable to Growers Bank, with the words "payment stopped" stamped across the face. Also a check dated June 30th, 1925, to the Bank of Italy, with the same stamped across the face. Here is one to the Growers Bank, dated June 30th, 1925. Here is one to the Security Warehouse and Cold Storage Company, San Jose, dated June 30th, 1925, payment stopped. That company gave me practically unlimited credit on cold storage merchandise until this time, when Mr. Patton pressed me immediately for payment of the account. After considerable persuasion I was given unlimited credit the following season beginning next year. The next check is the Southern Pacific Company, June 29th, with the words stamped across the face of the check, "payment stopped." That necessitated our issuing new bonds; we had to get out

(Testimony of J. C. Jewett.)

new bonds to take care of our freight charges. The result of the stopping of the payment of this check was that we had to file new bonds with the railroad company. J. J. O'Brien, a farmer who subleased to Japanese companies and anyway he has Japanese farmers. We had a great deal of difficulty in getting merchandise from him or Mr. O'Brien or from his companies following the receivership. The check is dated June 27th, 1925, payable to J. J. O'Brien, with the words, "payment stopped" stamped across its face. The next check, dated June 6th, 1925, to N. Carmen was signed by the receiver. Written on the bottom of the check is "payment stopped." It was for $33.36 for farm produce. I do not know how our credit was affected by the stoppage of the payment of that check because I did very little business with this party. R. E. Homsley, named in the check of June 27th, "payment stopped" is one of [47] the accounts that I did not receive any more consignments from. Of this check we did receive goods on consignment from him. Here is another check to Mrs. Homsley, dated June 30th, that would be the same as the other one. Our credit was affected adversely by it. Referring to a group of checks which bore date prior to June 30th, 1925, these checks were not paid in due course. They are signed by Mr. Joseph Napoli after he was appointed receiver, subsequent to June 30th, 1925, because they were held at the Bank for his signature as receiver before they would cash

(Testimony of J. C. Jewett.)

them. These are all dated prior to June 30th and are checks that the bank held that had been previously issued by the A. G. Col. Company and they would not cash them until Mr. Napoli had signed them as receiver. I think Mr. Napoli started signing checks July 3. I am not positive as to that date, but it was not previous to the receivership. From that time on they kept coming in for some time, every few days, and Mr. Napoli would go to the bank and sign the checks before they were signed. Referring to this group of checks that were held by the bank and could not be cashed until they were signed by Mr. Napoli, a number of them were employees checks. The remainder are mostly checks to growers, some to produce houses. The check of June 29, A. Arena & Co. Wholesale Growers and Shippers from Imperial Valley, Los Angeles, I had an open shipping account with them before this time and had goods on consignment. After the receivership I did not receive any more consignments. If I wanted any more of their merchandise it had to come with a draft attached to the bill of lading. Prior to June 30th, 1925, I handled a good many carloads of melons, I would say 15 or 20 carloads of melons, cantaloupes. That is in the year [48] from the 1st of January, to the 30th of June. Referring to the check dated June 16, 1925, to the Bakersfield Produce Company, after the receivership they said they did not want to sell to me for that if our check was no good. Referring to the check dated June 26th, payable

(Testimony of J. C. Jewett.)

to Hunt, Hatch & Co., San Francisco, our credit there was entirely stopped. A great deal of this bunch of checks is employees' checks. Mrs. Morrison was a grower in the San Jose district. We were not able to renew consignments with her. Up to this date we were buying goods on consignment, but we were not able to get an open consignment account from her until the following year.

The foregoing testimony was admitted over the objection of the defendant on the ground that it was immaterial, irrelevant and incompetent and outside the issues of the case and too remote, and was duly excepted to.

Plaintiff thereupon introduced in evidence the following checks, bearing "payment stopped" across the face thereof, the respective payees, amounts and dates of said checks being as follows:

EXHIBIT No. 4.

Payee of check:	Amount of check:	Date of check:
N. Carmen	$ 33.26	June 6, 1925
A. Ficke	32.50	" 27 "
D. Sacromona	30.00	" 27 "
R. E. Homsley	92.66	" 20 "
L. Melo	10.00	No date
R. E. Homsley	63.72	June 27, 1925
J. J. O'Brien	18.99	" 27 "
Southern Pacific	641.32	" 29 "
Security Warehouse & Cold Storage	564.12	" 30 "
Growers Bank	33.25	" 30 "
Growers Bank	68.00	" 30 "

Payee of check:	Amount of check:	Date of check:
Mrs. R. E. Homsley.....	28.50	June 13 1925
P. Vierengo	13.86	" 24 "
Bank of Italy	92.50	" 30 "
F. Hermis	33.20	" 24 "
Mrs. Williams	60.52	" 30 "
Mercantile Trust Co.....	37.00	" 30 "
[49]		
Jack Bros. & McBurney..	11.65	June 24, 1925
Half Moon Fruit & Produce	1683.26	" 25 "
W. A. Curtis Co.....	93.51	" 26 "
C. Bracciotti	25.44	" 26 "
De Metei & Co.....	187.20	" 26 "
De Back & Co.....	162.90	" 26 "
Ghiaselle Bros.	116.87	" 26 "
Jones & Pettigrew	28.00	" 26 "
Panama Truck Co.	159.05	" 26 "
Eveleth Nash Co.....	499.15	" 26 "
Levy & Zentner.....	258.28	" 26 "
C. Oka	129.10	" 30 "
M. Santa	45.09	" 27 "
Holl, Haas & Vessey.....	228.96	" 26 "

Plaintiff further introduced in evidence the following checks which did not have "payment stopped" stamped across the face thereof but were not paid in due course:

EXHIBIT No. 5.

Cardoza & Brazil.....	43.68	June 6, 1925
N. Spinelle	45.00	" 20 "
S. Minturn	55.23	" 24 "

Payee of check:	Amount of check:	Date of check:
Miller & Kocher	50.85	June 24 1925
Miller & Kocher	7.73	" 24 "
Miller & Kocher	31.94	" 24 "
Bakersfield Pro. Co.....	4.08	" 24 "
J. Conti	15.00	" 27 "
N. Spinelli	45.00	" 27 "
T. Noda	29.20	" 27 "
J. J. O'Brien #4.....	32.76	" 27 "
J. J. O'Brien #5.....	58.52	" 27 "
S. Matooka	93.82	" 29 "
M. Hiratsoka Co. 6.....	78.70	" 29 "
J. Zollers	26.72	" 30 "
Boorgoignon	23.08	July 2 "
Beanucci	20.95	July 24 "
K. Ogasawara	7.69	" 13 "
A. Arena & Co.....	334.23	" 29 "
Kakersfield Produce Co...	28.94	" 19 "
G. C. Hess	28.00	" 20 "
J. J. O'Brien Co. #4.....	72.11	" 20 "
J. J. O'Brien #5	59.18	" 20 "
C. W. Hunt.....	6.00	" 24 "
L. Sunseri	28.80	" 25 "
Hunt Hatch & Co.....	806.20	" 26 "
R. A. Col.....	75.00	" 27 "
G. C. Hess.....	45.00	" 27 "
E. Andre	45.00	" 27 "
G. C. Hess.....	28.00	" 27 "
G. C. Hess.....	51.26	" 27 "
G. C. Hess.....	75.00	" 27 "
J. J. O'Brien #14.....	56.70	" 27 "

[50]

(Testimony of J. C. Jewett.)

Payee of check:	Amount of check:	Date of check:
M. Morrison	$ 50.80	June 27, 1926
J. J. O'Brien #17	93.73	" 27 "
Ponzini	64.16	" 27 "
G. C. Hess	45.00	May 23 1925
G. C. Hess	45.00	" 16 "
G. C. Hess	45.00	" 8 "
G. C. Hess	28.00	" 2 "
G. C. Hess	45.00	Apr. 25 "
G. C. Hess	45.00	" 18 "
G. C. Hess	33	" 11 "
J. C. Jewett	250.00	July 2 "
Gladys Weymouth	100.00	" 2 "
C. L. Parker	175.00	" 2 "

These checks were all issued prior to July 2, and were endorsed by the respective payees thereof, and were not paid until subsequent to July 6, 1925.

Each of these checks was introduced over the defendant's objection that it was incompetent, irrelevant and immaterial and in each case the defendant excepted to the order of the Court admitting the respective checks in evidence. [51]

Mr. SHEFFEY.—You were doing business with the Bank of San Jose, were you not? A. Yes.

Q. Did you have any agreement with the Bank of San Jose as to the credit limit of the A. G. Col Company, Inc.?

Mr. ALEXANDER.—We object to that as calling for the conclusion of the witness. If there is a document, let us have the document.

(Testimony of J. C. Jewett.)

The COURT.—Yes, it does, but I will overrule the objection; exception.

Mr. SHEFFEY.—I mean prior to the 30th day of June, 1925.

A. I had a verbal agreement with the executives of the Bank of San Jose to extend me a $20,000 commercial account.

Q. At the time the receiver was appointed on the 30th day of June, 1925, how much had you borrowed on that commercial account?

A. $14,000, I believe, to be exact.

Q. Approximately, $14,000.

A. Approximately, $14,000.

Q. Ater the receiver was appointed, did the Bank threaten to call your loan?

A. The bank officials called me into conference, I believe it was the next day after the receivership, and told me that—

Mr. ALEXANDER.—Pardon me. We object to this as being hearsay, your Honor.

Mr. SHEFFEY.—You need not repeat what the Bank officials said to you, but just answer my question, if they threaten to call your loan.

A. They threatened to call my loan.

Q. What did you do then?

A. I immediately got in touch with my brother, in San Francisco.

Q. To whom do you refer—E. L. Jewett?

A. E. L. Jewett. He got in touch with his counsel, Mr. Sheffey, who [52] came to San Jose, and we went into conference with the bank officials,

(Testimony of J. C. Jewett.)

and on a promise that we would reduce the loan a certain percentage each month, they consented to allow the loan to ride temporarily.

Q. That was the loan of $14,000, you speak of?

A. Yes.

Q. Was anything said about additional credit over the $14,000 after this conference with the bank officials that you speak of?

A. They told me they would not allow us any additional credit.

Q. Why?

Mr. ALEXANDER.—We object to this as being immaterial, irrelevant, and incompetent, the reason why.

Mr. SHEFFEY.—Q. Was any publicity given to the fact of the appointment of a receiver for the business of the A. G. Col Company, Inc., in the newspapers of San Jose?

Mr. ALEXANDER.—We object to that as being outside the issues here, and as being immaterial, irrelevant and incompetent.

The COURT.—Objection overruled; exception.

A. There was quite an elaborate article printed in both the San Jose papers.

Mr. SHEFFEY.—Q. How much of a volume of business were you doing the first six months of the year 1925? How much were your gross sales, approximately?

A. I would say approximately $300,000.

Q. $300,000 for the first six months?

A. Approximately, yes.

(Testimony of J. C. Jewett.)

Q. Do you know whether or not your business had shown a profit for that period of time, or a loss?

Mr. ALEXANDER.—We object to that, your Honor, because [53] it is his conclusion. Profits are determined in so many different ways.

The COURT.—Objection overruled; exception.

A. Our profits on the first of June, or, rather on the last day of May showed, I believe, approximately $15,000, net profit. That means 1925.

Mr. SHEFFEY.—Q. You, of course, kept books in this business, did you not, Mr. Jewett, or, rather, they were kept under your supervision.

A. Yes, the books were kept under my supervision.

Q. I want to show you a statement—

The COURT.—Showing the profits?

Mr. SHEFFEY.—Yes, showing the profit, and the amount of business done.

Q. Just state to the jury what that statement is.

A. A profit and loss statement of January 31, 1925.

Q. How much were your merchandise purchases for the month of January, 1925, shown by that statement?

A. Merchandise purchases, January $31,064.04.

Q. How much merchandise did you sell for that month?

A. Merchandise sales $38,729.13.

Q. Did you make a profit that month?

(Testimony of J. C. Jewett.)

The COURT.—Do the books of account show whether they made a profit, or not?

Mr. SHEFFEY.—Yes, your Honor.

The COURT.—Why don't you introduce the books of account?

Mr. SHEFFEY.—These are statements taken from the books, your Honor.

The COURT.—Q. Is this a loose leaf ledger?

A. Yes, sir. [54]

Mr. ALEXANDER.—Q. For one month, isn't it?

A. Yes, sir.

Mr. SHEFFEY.—This is a trial balance, your Honor.

The COURT.—Q. You are not the bookkeeper, are you?

A. No, I am not the bookkeeper.

The COURT.—This witness does not seem to be familiar with it. If it is part of the books it is admissible and you can read it to the jury, or have the bookkeeper do it.

Mr. SHEFFEY.—This is a profit and loss statement of January 31, 1925, taken from the books of account of the A. G. Col Company, Inc. This part is the bookkeeper's work sheet, and the other one is the finished sheet. I wish to offer these in evidence as Plaintiff's Exhibit 6.

Mr. ALEXANDER.—We make this formal objection that the foundation has not been laid, and it is immaterial, irrelevant and incompetent.

Mr. SHEFFEY.—Well, if Mr. Alexander wants the books in evidence I will have to put the books in evidence.

(Testimony of J. C. Jewett.)

Q. You have kept books of account for the A. G. Col Company, Inc.?

A. The books were kept under my supervision.

Q. Under your supervision, and under your direction? A. Yes.

Q. What books of account did you keep?

A. A cash-book, a journal, a ledger.

The COURT.—Q. And the books were true books of account, honestly kept?

A. The books were honestly kept, so far as I know.

Q. And the entries were made of the transactions reasonably?

A. The entries were made of all transactions.

Q. Promptly, that is, at the time of the transaction? A. Yes, sir. [55]

The COURT.—That is a sufficient foundation. Objection overruled.

Mr. ALEXANDER.—Exception.

(Plaintiff's Exhibit 6.)

The COURT.—Now, you don't need to introduce all the books of account unless there is an objection to this particular document.

Mr. SHEFFEY.—This is a profit and loss statement.

The COURT.—Taken from the loose leaf ledger.

Mr. ALEXANDER.—For one month.

The COURT.—Yes, January, 1925.

Mr. SHEFFEY.—I wish to offer in evidence a profit and loss statement—

The COURT.—Just a moment. Is there anything in the first sheet, the exhibit that you have

just introduced, to which you want to call the attention of the jury?

Mr. SHEFFEY.—Yes, I wish to call the jury's attention to the fact that for the month of January, 1925, the merchandise purchases of this company were $31,464.04; the merchandise sales were $38,729.13; that the net profit for that month was $5,039.67; that the accounts payable for that month were $18,784; that the accounts receivable for that month were $50,480.

Now, I wish to offer in evidence the same kind of statements for the months of February, March, April, May and for the month of September, of 1925.

Mr. ALEXANDER.—We object to them as immaterial, irrelevant, and incompetent, and no proper foundation laid.

The COURT.—Objection overruled. Exception.

Mr. ALEXANDER.—And the fact that they pick out certain months, instead of giving us the continuous sequence. [56]

(Plaintiff's Exhibit 7.)

Mr. SHEFFEY.—In those statements, I went to call the jury's attention to these figures. For the month of February, 1925, the gross merchandise purchases by this plaintiff were $24,875; the sales for that month were $34,828, that the business for that month took a loss of $3724. That the accounts payable for that month were $19,950; that the accounts receivable at the end of that month were $51,188.

For the month of March, 1925, total merchandise purchased, $36,293; total merchandise sales $54,-407; the net profit for the month of March was $2,554. Accounts payable at the end of that month were $19,335; accounts receivable were $48,498.

For the month of April, the merchandise purchases were $41,760; merchandise sold $60,427; the net profit for that month was $3,743. Accounts payable at the end of that month $25,776. Accounts receivable $52,369.

For the month of May the merchandise purchases were $58,729; the merchandise sales were $64,101; the net profit for that month was $7,981. Accounts payable for that month, $19,121; accounts receivable, $55,446.

There was a total profit from the 1st of January to the 31st of May of $15,594.

I also wish to offer in evidence two trial balances, taken from the books of the A. G. Col Company, Inc., one at the end of August, to wit: August 31, 1925, and one at the end of September, to wit, September 30, 1925.

Mr. ALEXANDER.—The same objection, your Honor.

The COURT.—Objection overruled. Exception. (Plaintiff's Exhibit 8.) [57]

Mr. SHEFFEY.—From these statements, and from the books in evidence, I want to call the jury's attention to these figures. At the end of the month of June the accounts payable were $19,090; the accounts receivable were $54,381.

(Testimony of J. C. Jewett.)

At the end of July, 1925, the accounts payable were $8,840; the accounts receivable $48,227.

At the end of August the accounts payable were $4,970; the accounts receivable were $40,861.

For the month of September, 1925, the merchandise purchases were $30,685; the merchandise sales were $37,725. At the end of September the total profit for the year for this business from January 1 to September 30, 1925, was $991.08. The accounts payable at the end of September, 1925, $11,236, and the accounts receivable $38,929.

Q. Mr. Jewett, can you tell the jury why you did not have this trial balance for the month of June, 1925.

A. We were in the hands of the receiver, and the trial balance was not made.

Q. The receiver took charge of your books, did he not, on the 30th day of June?

A. The receiver took full possession.

Q. And your business continued in receivership until the 8th day of August, 1925, did it not?

A. Yes.

Cross-examination.

Mr. ALEXANDER.—Q. You say the receivership continued until August; is it not a fact that Mr. Col, whose bond is sued on here, was only in for a couple of days?

Mr. SHEFFEY.—Just a moment. I object to that. The record in the receivership action is the best evidence, and it is here in court. [58]

(Testimony of J. C. Jewett.)

The COURT.—The record is the best evidence, if it shows it.

Mr. ALEXANDER.—All right. In order to avoid questions, Mr. Sheffey, you have all the records here in the suit in which the receiver was appointed, haven't you?

The COURT.—What does the record show? There ought not to be any quibbling about that.

Mr. ALEXANDER.—The record shows that on the 1st of July an order was made that a new receiver come in, and Mr. Col go out. That order was made on the 1st and filed on the 2d of July.

The COURT.—Is there any dispute about that? Is that true?

Mr. ALEXANDER.—Counsel seems to dispute it. I don't know why.

Mr. AMES.—The record will show that the receiver Col was appointed on June 30. There was a court order made on July 1st, as Mr. Alexander has designated, reciting in there that the order was vacated. He made a report, however, on the 3d of July, and a second receiver was appointed on the 3d of July.

Mr. ALEXANDER.—The order is dated July 1, 1925, appointing another man receiver, Mr. Napoli, and was filed on July 2, 1925.

Mr. AMES.—He did not qualify and take oath until the 3d of July.

Mr. ALEXANDER.—Be that as it may. The point I want to bring out from the witness is that Mr. Col was only in for a very few days, at most.

(Testimony of J. C. Jewett.)

Q. Isn't that so, Mr. Jewett? A. Yes. [59]

Mr. SHEFFEY.—That will be stipulated, your Honor.

Mr. ALEXANDER.—Q. And the receivership which lasted for some time later was not the receivership of Mr. Col at all, was it?

The COURT.—That is true, in view of the record.

Mr. ALEXANDER.—Q. In fact, it was Mr. Napoli who was receiver afterwards?

A. Yes.

Q. And he was there quite a while? A. Yes.

Q. Is it not a fact you only had $54.00 in bank before Mr. Col came in, and that in spite of that fact you had drawn these checks aggregating over $4,000? A. I do not know that it is a fact.

Q. Do you know what the fact is? To be exact, is it not a fact that Mr. Col came in and you had only $52.88 in the bank—I mean the plaintiff corporation had?

A. It was my agreement at the bank that—

Q. Please answer the question.

A. I don't know.

Q. Is it not a fact that whatever you had in the bank, you had all these checks outstanding, which aggregated $3,886.27? Do you know that?

A. I do not know.

Q. All these checks were outstanding, were they not, at the time of the receivership?

The COURT.—He has testified that they were.

Mr. ALEXANDER.—Q. Is it not a fact that at

(Testimony of J. C. Jewett.)

that time for current accounts payable, the corporation owed close to $30,000?

Mr. SHEFFEY.—I submit, your Honor, that the books and records are the best evidence of that. They are in evidence. The witness cannot testify from his memory as to all these facts and figures. [60]

The COURT.—Objection overruled. Exception.

A. I do not know.

Mr. ALEXANDER.—Q. Don't you know there was an outstanding note unsecured, to the bank of San Jose, for $20,000, at the end of June, 1925?

A. No, I do not.

Q. Don't you know that there was an outstanding note in favor of M. M. Jewett for $34,968 at that time?

A. I don't know what amount we owed Mrs. Jewett?

Q. You owed her pretty close to $35,000 at that time, didn't you? A. I don't know.

Q. You owed her a lot of money; you know that, don't you? A. We owed her some money.

Q. Don't you know you mortgaged the place to the Bank of San Jose for all that you could borrow? A. We did not.

Q. There was a mortgage, was there not?

A. There was a mortgage, but not to that extent.

Q. A. $20,000 mortgage?

A. There was a $20,000 mortgage on property, $52,000 worth of property.

(Testimony of J. C. Jewett.)

Q. You had current liabilities at that time of about $50,000 or more?

A. I don't know what the amount was.

Q. Don't you know that in addition you had the note of M. M. Jewett, and the Bank of San Jose, for $55,000 more? Don't you know what the fact is? A. I do not.

Q. You had trouble with the bank before about checks, did you not?

A. I never had any trouble with that bank.

Q. You had trouble with the other bank about your credit, had you not?

A. Not with the credit.

Q. Is it not a fact that the other bank told you to take your account away? A. They did not.

Q. You did take your account away?

A. I did, bot not on [61] their order.

Q. They wanted you to pay up, didn't they? Isn't that the fact? A. No, sir.

Q. Were they not trusting you?

A. That was not the reason the account was changed.

Q. Is it not a fact that you had been pressed for cash before the receivership by the bank you were doing business with on the 30th of June, 1925?

A. No.

Q. No trouble at all. Your sales for the first six months were about how much?

A. Approximately $300,000.

Q. That is for the first six months? A. Yes.

(Testimony of J. C. Jewett.)

Q. Is it not a fact that after the receivership your concern got all the merchandise it wanted?

A. No, sir.

Q. Is it not a fact that it bought as much merchandise in the second half as it did in the first half year, if you know?

A. I do not know if that is the fact or not.

Q. You don't know how much was sold or bought?

A. The second half of the year should exceed the first half.

Q. And it did, didn't it?

A. I don't know if it did, or not.

Q. Who drew these checks that were shown here this morning—originally?

A. These checks, I think, were all drawn by Mr. Parker?

Q. Under your direction?

A. He was working for me.

Q. You were the manager, were you not?

A. Yes.

Q. Did you know, when these checks were drawn, that you only had $54.00 in the bank?

A. I did not know it. It didn't make any particular difference to me, because the bank account had allowed me an extended credit.

Q. Had you put up any collateral, or anything else, for that credit? A. No, sir. [62]

Q. Had you given any note for it?

A. They had several notes.

Q. Is it not a fact that they had not credited

(Testimony of J. C. Jewett.)

your deposit account with any sum at that time, and the only amount to your credit was what I spoke of before? A. I don't know.

Q. You had been asked to close your account with the First National Bank, had you not?

A. I had not.

Q. It had been closed, had it not? A. Yes.

Q. And the bank had requested it, had it not?

A. No, sir.

Q. What was the reason for closing that account?

A. I closed it.

Q. What was the reason?

A. Because I thought some people were getting too much information.

Q. Did Mr. Col ever sign a check while he was there? A. I don't think he did.

Q. Is it not a fact that the only thing he ever did when he was receiver was to put a guard over the books at night?

A. Put a guard over the books at night?

Q. Yes.

A. He put a guard over the books right away and started an audit.

Q. He started an audit, did he? A. Yes.

Q. Did he complete that audit? Did Mr. Col complete that audit? He went out before it was completed, didn't he?

A. No, he did not go out, he was told to get out.

Q. He went out, did he not, before the audit was completed? A. The auditor went out, yes.

(Testimony of J. C. Jewett.)

Q. I say Mr. Col went out before the audit was completed?

A. Mr. Col was not auditing the books.

Q. Will you answer the question? He went out before the audit was completed, didn't he?

A. You mean Mr. Col went [63] out as receiver?

Q. Yes, as receiver. A. Yes.

Q. Did you ever draw a check, that you know of?

A. Not that I know of.

Q. Is it not a fact that the months of July, August and September, the three months following the receivership, were the best months you had that year? A. No, sir.

Q. Is it not a fact that you sold more merchandise during these three months, if you know?

A. I don't know.

Q. Then how do you know they were not the best months?

A. How do I know they were not the best months?

Q. Yes. A. Because we did not show a profit.

Q. Is it not a fact that the sales increased after the receivership?

A. No, sir, I don't think so.

Q. Do you know, or do you just don't think so?

A. I don't know.

Q. How much had you lost the year before? Was it $8,000?

A. I don't know. The records will show it.

(Testimony of J. C. Jewett.)

Q. Business went along right after the receivership as it did before, didn't it? A. No, sir.

Q. Sales went on, didn't they?

A. After a fashion.

Q. A pretty big fashion, wasn't it?

A. No, sir.

Q. It was not? A. No, sir.

Q. Wasn't it over $50,000 a month?

A. Possibly so. We had to make concessions to keep the business going, and increase the business, and try and hold the trade.

I don't know whether or not it is a fact that the plaintiff lost $15,000 in 1923. It is not a fact. There was a net loss for the year 1922 of $73,000. I don't know what the fact is regarding any loss in 1923. In 1924, the plaintiff [64] lost $15,825.58; and in 1925 the loss was $8,242.65; and in 1926 the loss was $8,011.83.

Mr. ALEXANDER.—Q. Is it not a fact that there was a loss every year, Mr. Jewett, so far as you know?

A. I do not know it.

Q. And you tell us that suddenly, in the first five months of 1925, you made $15,000. Is that your statement? A. Yes.

Q. Is it not a fact that the sales in 1925 were $80,000 more than in 1924, if you know?

A. I do not know.

Q. Do you know how much merchandise you purchased in the first part of 1925?

(Testimony of J. C. Jewett.)

Mr. SHEFFEY.—I object to the question as indefinite. What do you mean by the first part of 1925?

Mr. ALEXANDER.—The first six months.

A. No, I don't know.

Q. Is it not a fact that the business was rehabilitated and stabilized by the receivership?

A. No, sir.

Q. Didn't you have to go into bankruptcy at the time of the receivership? A. No, sir.

Q. You are sure of that, are you? A. Yes.

Q. Is it not a fact that you had trouble with customers before the receivership about being slow pay?

A. Some of our customers were slow pays, yes.

Q. You had trouble with people that you bought from about your being slow pay. Is that not so?

A. I presume I was jacked up once in a while about payments.

Redirect Examination.

Mr. SHEFFEY.—Q. About your bank credit, Mr. Jewett, you testified that you had an agreement with the bank to extend to you a $20,000 credit limit, did you not?

A. Yes. [65]

Q. Suppose you did have an overdraft in the bank, so long as it did not exceed $20,000, the bank would honor the checks, would it not? A. Yes.

Q. That was your agreement with them, was it not? A. Yes.

(Testimony of J. C. Jewett.)

Q. And you at no time overchecked your $20,000 credit limit with the bank, did you? A. No, sir.

Q. And on the 30th day of June, 1925, there were not sufficient checks outstanding to overdraw your credit limit of $20,000, was there? A. No, sir.

Q. If you happened to have an overdraft at the bank, and did not have deposits to meet it, what did you do at the bank? A. I signed a note.

Q. You gave them a note? A. Yes.

Q. These checks that were outstanding on the 30th day of June, 1925, at what time of the month do you usually receive payment on account of your accounts receivable?

A. From the first to the 10th of the month.

Q. Then your collections on your accounts receivable would have been from the 1st of July to the 10th of July, would they not?

A. Most of them.

Q. Would your collections for those ten days have been more than sufficient to overcome this overdraft at the bank? A. Yes, sir.

Q. If the checks came in before you made your deposit? A. Yes.

Q. As a matter of fact, you had no overdraft at the bank, did you—these checks were merely outstanding? A. I had no overdraft at the bank.

Q. And you would not have had an overdraft until the checks were returned to the bank for payment; is not that the fact? A. Yes. [66]

Q. And if your collections came in in their usual course, you would have had sufficient collections

(Testimony of J. C. Jewett.)

from your accounts receivable to have more than taken care of the outstanding checks, would you?

A. Yes.

Q. You testified that the Company owed to Mrs. Mabel M. Jewett about $35,000; Mrs. Jewett was a stockholder and director of the corporation, was she not? A. Yes.

Q. Had she ever pressed you for payment of her obligation? A. No.

Q. Mrs. Mabel Jewett is the wife of your deceased brother, Lee Jewett? A. Yes.

Q. And Mr. Lee Jewett was the president of this company up to the time of his death, was he not?

A. Yes.

Q. With reference to counsel's questions as to whether or not your firm was a slow pay of its accounts payable, were you ever sued for any account that you did not pay? A. No, sir.

Q. And the company always met its accounts, did it not? A. Yes, sir.

Q. What was the usual margin of profit that you made on your sales in the ordinary course of your business?

A. I tried to maintain a 15 per cent profit.

Mr. SHEFFEY.—I want to offer in evidence, your Honor, since we have not the income tax statement for 1923 here, a profit and loss statement of the A. C. Col Company, Inc., for the year 1923. I wish to offer in evidence the profit and loss statement of A. G. Col Company, Inc., for the year 1923.

(Testimony of J. C. Jewett.)

Mr. ALEXANDER.—To which we object on the same grounds.

The COURT.—Objection overruled. Exception.

(Plaintiff's Exhibit 9.) [67]

Mr. SHEFFEY.—I wish to call the jury's attention to the fact that this business made a profit of $12,687.09 as shown by that statement.

Q. Mr. Alexander asked you about a loan of $20,000 from the bank. Did you have a secured loan with the bank for $20,000?

A. We had a mortgage on the property.

Q. A mortgage on the property for $20,000.

A. Yes. The property securing the loan for $20,000 was appraised at $52,600.

Recross-examination.

Mr. ALEXANDER.—Q. Is it a fact that you expected between the 1st and the 10th to get checks in and with those moneys deposited to pay the checks you had previously drawn: Was that your testimony?

A. No.

Q. Was this note to Mrs. Jewett past due, the note for $35,000? A. I don't know.

Q. In the statement of 1923, that you spoke of, is it not a fact that you merely took depreciation on the entire plant-everything, in the sum of $200?

Mr. SHEFFEY.—I suggest, your Honor, that the statements speak for themselves.

Mr. ALEXANDER. — That is the fact in the statement.

(Testimony of J. C. Jewett.)

The COURT.—Objection overruled.

A. I don't know.

Mr. ALEXANDER.—Will it be conceded that the statement so shows, Counsel?

Mr. SHEFFEY.—I don't know what it shows, but it speaks for itself. [68]

Mr. ALEXANDER.—Is it not a further fact that they only charged off $421 for bad debts during that year?

The COURT.—Does the statement show that?

Mr. ALEXANDER. — It does, your Honor, I checked that.

The COURT.—Then let us not take the time to ask the question.

Mr. ALEXANDER.—Q. What was the name of the manager that you had in 1923?

A. I succeeded George Matthews.

Q. Is it not a fact that this statement was made under the direction of George Matthews, and was colored to indicate that the concern was making a profit?

Mr. SHEFFEY.—I object to the question as calling for the conclusion of the witness.

The COURT.—Objection overruled.

Mr. ALEXANDER.—Q. What is the fact?

A. I don't know.

Q. Don't you know that some months afterwards, after he had gone, you rechecked and you found you did not make any profit, at all, but sustained a loss for that year? Don't you know that that is a fact?

A. No.

(Testimony of J. C. Jewett.)

Q. Don't you know that after he left those figures were rechecked; do you know what the fact is?

A. No, I don't.

Q. Don't you know that you had an auditor in to recheck on those figures? A. No.

Q. Will you say that you did not recheck on those figures and find a loss?

A. I don't know that they were rechecked.

Q. You don't know. Is that the answer.

A. I don't know.

Q. And you are the manager?

The COURT.—Yes, he is the manager. He has so testified.

Mr. ALEXANDER.—That is all.

Mr. SHEFFEY.—I wish to offer in evidence, your Honor, [69] certified copies of an order permitting the plaintiff to maintain this action, and a certified copy of the oath of Mr. A. G. Col, qualifying as receiver.

The COURT.—Let them be admitted as one exhibit.

PLAINTIFF'S EXHIBIT No. 10.

In the Superior Court of the State of California, in and for the City and County of San Francisco.

Dept. No. 8.

No. 171,790.

CALIFORNIA SWEET POTATO CORPORATION,

Plaintiff,

vs.

L. E. BONTZ, et al.,

Defendants.

ORDER.

Upon the affidavit filed in the above-entitled matter on behalf of A. G. Col Company, Inc., a corporation, and upon the stipulation made in behalf of the State of California in said matter, and good cause appearing therefor, it is hereby

ORDERED, ADJUDGED and DECREED that A. G. Col Company, Inc., a corporation, one of the defendants in the above-entitled matter, may maintain and prosecute in its own name, and for its own use and benefit, and in its own behalf, an action on the bond filed by A. G. Col as receiver in the above-entitled matter, for any damage or claim of damage which the said A. G. Col Company, Inc., a corporation, suffered on account of the wrongful appointment of the said receiver or the procuring of the

said appointment wrongfully and without sufficient cause.

T. I. FITZPATRICK,
Judge of the Superior Court. [70]

In the Superior Court of the State of California, in and for the County of Santa Clara.

No. 31,959.

CALIFORNIA SWEET POTATO CORPORATION, a Corporation,

Plaintiff,

vs.

L. E. BONTZ, et al.,

Defendants.

OATH OF RECEIVER.

State of California,
County of Santa Clara,—ss.

I do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully discharge the duties of receiver in the above-entitled action and obey the order of the above-entitled court.

[Seal] (Signed) A. G. COL.

Subscribed and sworn to before me this 30th day of June, 1925.

[Seal] (Signed) W. E. FOLEY,
Notary Public in and for the County of Santa Clara, State of California.

Mr. SHEFFEY.—I want to offer in evidence the opinion and order of the Supreme Court of the State of California, in the case entitled A. G. Col Company, a Corporation, et al., Petitioner, vs. Superior Court of Santa Clara County, et al., Respondents, reported in Sup. Ct. Rep., 196 Cal. 604. I offer this for the reason that Mr. Alexander has denied that the receiver was wrongfully appointed. This is my proof that the receiver was wrongfully appointed. I do not believe I can get the order in, your Honor, without the opinion preceding it; the opinion covers about 17 pages.

The COURT.—It is unnecessary to read that, of course. What happened in that case? The order appointing the receiver, [71] I imagine, was held void?

Mr. SHEFFEY.—This is the concluding paragraph of the opinion of the Court. The opinion was written by Houser, J., and concurred in by all the members of the Court:

"It is the order of the court that the order of the trial court, by which A. G. Col was appointed receiver on the *ex parte* application of the plaintiff in the suit to which reference has been made, as well as the later order therein appointing J. P. Napoli receiver, on the hearing of defendant's motion to vacate the former order, be and they are hereby vacated and annulled."

The COURT.—That will be sufficient.

TESTIMONY OF SIMEON E. SHEFFEY, FOR PLAINTIFF.

SIMEON E. SHEFFEY, called as a witness for the plaintiff, being duly sworn, testified as follows:

Direct Examination.

I am an attorney at law, duly licensed as such, and was actually practicing in the year 1925, and I was employed by the plaintiff in this action in connection with the receivership. When we received information that a receiver had been appointed for the business of A. G. Col Company, Inc., my office was in San Francisco, and upon receiving information I got the first train to San Jose and began the preparation of papers and documents necessary to have a hearing for the vacation before the Superior Court of Santa Clara County of the order appointing A. G. Col as receiver. The hearing was, I believe, July 1st, in the afternoon. Mr. Napoli was appointed receiver, I believe, on July 2d. I was paid $1000 by the plaintiff in this action for the service of setting aside the appointment of Mr. Col as receiver. There were other incidental expenses [72] approximating $200.00 in connection with the dispossessing of Mr. Col. The amount paid was a reasonable fee for getting Mr. Col out of the business as receiver.

Thereupon the bond, a copy of which is attached to plaintiff's complaint in this action, was admitted in evidence. The bond is in words and figures as follows:

In the Superior Court of the State of California, in and for the County of Santa Clara.

No. 31,959.

CALIFORNIA SWEET POTATO CORPORATION, a Corporation,

Plaintiff,

vs.

L. E. BONTZ, et al.,

Defendants.

BOND OF RECEIVER.

KNOW ALL MEN BY THESE PRESENTS, That we, A. G. Col, principal, and Fidelity and Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland, and duly authorized to transact a general surety business in the State of California, as Surety, are held and firmly bound unto the State of California in the sum of Five Thousand ($5,000.00) Dollars to be paid to said State of California, for which payment well and truly to be made, we and each of us bind ourselves, jointly and severally, and our respective heirs, executors and administrators firmly by these presents.

WHEREAS, by an order of the Superior Court of the State of California in and for the County of Santa Clara made on the 30th day of June, 1925, in an action therein pending wherein the California Sweet Potato Corporation, is plaintiff and L. E. Bontz, C. W. Hunt, Grant J. Hunt, A. G. Col Com-

pany, a Corporation, A. G. Col Company, Inc., a corporation, First Doe, Second Die, Third Doe, Fourth, Doe, Sixth Doe and Seventh Doe are defendants, it was among other things ordered that the above bonded A. G. Col be appointed receiver of the property described in the complaint in said cause, consisting briefly of: Wholesale fruit and produce, Warehouse and Commission business, trucks and delivery wagons, and goods, wares and merchandise on the premises situate of the West side of St. James Street, between Market and San Pedro Streets, in San Jose, Santa Clara County, California, with the usual powers and duties of receivers as set forth in said order, and that he be vested with all rights and powers as such receiver upon filing a bond for the faithful performance of his duties in the penal sum of Five Thousand ($5,000.00) Dollars. [73]

NOW, THEREFORE, The condition of this obligation is such that if the said A. G. Col and said Surety, their heirs, executors and administrators, or any of them, shall well and truly pay to the defendants, or either of them, all damages that all, or either of them, may sustain by reason of the appointment of said receiver and entry by him upon his duties in case the applicant shall have procured said appointment wrongfully, maliciously, or without just cause, and the said receiver shall faithfully perform all of his duties as such receiver, then the

above obligation to be void, otherwise to remain in full force and effect.

A. G. COL, (Seal)
FIDELITY AND DEPOSIT COMPANY OF MARYLAND.
By M. E. PAGE,
Attorney-in-fact.

State of California,
County of Santa Clara,—ss.

On this 30th day of June, A. D. 1925, before me N. E. Wretman, a Notary Public in and for the said County of Santa Clara personally appeared M. E. Page, attorney-in-fact for the Fidelity and Deposit Company of Maryland, to me personally known to be the individual described in and who executed the within instrument, and he acknowledged the execution of the same, and being by me duly sworn, deposeth and saith, that he is the said Attorney-in-fact of the Company aforesaid, and that the seal affixed to the within instrument is the corporate seal of the said company, and that the said corporate seal and his signature as such Attorney-in-fact were duly affixed and subscribed to the said instrument by the authority and direction of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the City of San Jose, State of California the day and year first above written.

[Seal] N. E. WRETMAN,
Notary Public in and for the Said County of Santa Clara, State of California.

The plaintiff thereupon rested. [74]

TESTIMONY OF CARL S. PARKER, FOR DEFENDANT.

CARL S. PARKER, called as a witness for the defendant, being duly sworn, testified as follows:

Direct Examination.

During the year 1925 I was a bookkeeper of the plaintiff, A. G. Col Company, Inc., and I was familiar with the books of that concern as bookkeeper from December 1, 1923, to March 1, 1926. We found out that the statement submitted as of December 1, 1923, and showing a profit, was incorrect.

Q. How did that come about?

A. The general manager at the time had the books for a short time, and that statement was made up from his books.

Q. And was a new check made? A. It was.

Q. Was it found that that profit was a fictitious one? A. It was.

Q. And had not been made in 1923.

A. It had not.

Mr. Col came in as receiver on the 30th day of June, 1925, about three o'clock in the afternoon, and did not stay over two days. The only thing he did was to demand the books and cash and have an inventory taken. Prior to the end of June, 1925, the plaintiff had trouble in getting money and paying the accounts payable. After the receivership I don't know of any merchandise that Mr. Jewett

(Testimony of Carl S. Parker.)

wanted that they could not get. We make up a balance sheet for income tax purposes once a year on December 31st. In the meantime we make up a trial balance, but do not charge off anything on this trial balance for bad debts or depreciation. At the time Mr. Col walked in there were probably accounts payable which had not been entered. Before the receivership the A. G. Col Company had trouble in getting credit, and money to pay their accounts [75] payable. They had this trouble with some men in San Francisco that needed money, several commission houses, and they would write down and telephone down to J. C. Jewett. Mr. Jewett, who was then president of the corporation, told me of this trouble, and bills would come in marked "Please remit," "Past due," "Long overdue." Mr. E. L. Jewett, President, told me of this trouble. He is now dead.

A correct statement would show deductions for bad debts and depreciation, 25% on trucks and equipment, and 10% on buildings. These were left out of the monthly trial balance. Also there were left out of the monthly trial balance a number of accounts payable, where the amount was held open for all of the bills to come in.

Q. Who prepared those statements, Plaintiff's Exhibit No. 7, the Profit and Loss statement for the months in 1925?

A. I do not know whose figures these are, they are not mine.

Q. You don't know those figures? A. No, sir.

(Testimony of Carl S. Parker.)

Q. Whose figures are these, referring to the Profit and Loss statement in Exhibit 7 for the month of February, 1925?

A. Those are my figures.

Q. You prepared that statement, didn't you?

A. This one.

Q. Referring to your statement of February, 1925, I will show you a Profit and Loss statement for January, 1925, Plaintiff's Exhibit No. 6, and ask you who prepared those figures.

A. I prepared this one.

Q. Was that a correct statement of the books of the A. G. Col Company, Inc., at that time?

A. That was the correct statement of the books as they stood.

Q. As they stood? A. As they stood.

Q. And covering what period of time?

A. January 31, 1925. That would be from the 1st to the 31st of January, 1925. [76]

Q. Does that statement show whether the A. G. Col. Co., Inc., made a profit or a loss for that month?

A. This statement shows they made a profit for that month.

Q. How much? A. $5,039.67.

Q. I will refer you now to the statement of February 28, 1925, Plaintiff's Exhibit 7, and ask you did you prepare the figures in that statement?

A. I did on this one, here.

Q. What period of time does that statement cover? A. February.

(Testimony of Carl S. Parker.)

Q. From what time to what time?

A. From January 1 to February 28th or 29th, 1925.

The COURT.—Q. Do you mean January 1, or January 31?

A. From January 1 to the last day of February.

Mr. SHEFFEY.—Q. The statements would be prepared monthly, and they would be prepared from the first of the year to the end of the particular month?

A. It shows the profit from the first of the year to the time when the Profit and Loss statement was taken.

Q. That shows profit or loss for the period of time from the 1st of January, 1925, to the 28th of February, 1925? A. It does.

Q. How much? A. $1,315.24.

Q. That is the net profit for the two months?

A. For the two months.

Q. And, consequently, for the month of February you must have taken a loss? A. We took a loss.

Q. Now, referring to the statement for March, 1925, which you have in your hand, there, Plaintiff's Exhibit 7, I will ask you who prepared the figures in that statement. A. They are my figures.

Q. I will ask you whether or not that statement shows that [77] the A. G. Col Co., Inc., made a profit for the year 1925, up to the end of March of that year? A. It did.

Q. What profit does it show? A. $3,699.52.

Q. And the difference between that figure and the

(Testimony of Carl S. Parker.)

figure for February shows how much profit you made for month of March?

A. It shows a profit of $2,384.28.

Q. Is it not $2,554.82?

A. No, sir, it is $2,384.28.

Q. Your mathematics are wrong, or mine are.

A. I think you are taking the total on the other sheet, instead of the correct total here.

Q. The correct total is what total?

A. $3,699.52. Did you take $3,870.08?

Q. Yes. A. You took the wrong figure.

Q. Now, I will refer you to the statement for April, 1925, and ask you who prepared the figures on that statement? A. I did.

Q. Does that statement show a profit, or a loss for April, from the 1st of the year to the end of April, 1925? A. It shows a profit.

Q. What profit? A. $7,302.92.

Q. And the difference between that figure and the figure of $3,699.52 at the end of March represents the profit you made in April, 1925, does it not? A. It does.

Q. How much was that profit? Can you give figure, offhand? A. $3,503.40.

Q. What is the next statement, Mr. Parker?

A. September.

Q. Who prepared the figures for that statement?

A. I did.

Q. What does that statement show as to the amount of profit the A. G. Col Company, Inc., had made from the 1st of January, 1925, to the end of

(Testimony of Carl S. Parker.)

September, 1925? A. A profit [78] of $38.05.

Q. In other words, between the end of April, 1925, and the end of September, 1925, the business had lost all of the profits it had at the end of April, except $38.05? A. It did.

Q. You gave me the figure, I believe, for the profit at the end of April as $7,302.92? A. Yes.

TESTIMONY OF E. M. ROSENTHAL, FOR DEFENDANT.

E. M. ROSENTHAL, called as a witness for the defendant, being first duly sworn, testified as follows:

Direct Examination.

My name is E. M. Rosenthal, and I reside at San Jose, and have my office there. I act as auditor or accountant for various corporations, and I had contact, as auditor of the firm, with the plaintiff A. G. Col Company, Inc., from 1922 to 1926 or 1927.

Mr. ALEXANDER.—Q. The question is, during those years, 1922 to 1926, did the corporation make any profit during that time?

A. From what year?

Q. 1922 to 1926.

A. I know they made none in 1923, 1924—no, 1923, I did not prepare that one. In 1922 there was a big loss, there, but that was a combination of the old A. G. Col Company and the new firm. They came in about the middle of the year, and in reconciling the accounts a great many matters had to be

(Testimony of E. M. Rosenthal.)

thrown out, and it reflected a big loss to the corporation. I know there was a loss in 1924 of about $15,000; another loss in 1925 of about $8,000, and another loss in 1926 of about $8,000. The 1923 income tax return——I have not the data available, those were all turned in, I prepared that from a work sheet after the pre-closing trial balance.

The balance sheet as of July 1st, 1925, shows a profit [79] for the first six months of that year amounting to $11,561.96. It does not make any allowance for depreciation. A normal yearly depreciation would be $4,493.24, and nothing is charged off in this statement. It is all charged up to the last six months. Bad debts amounted to $3,894.05 for the year, but they are not reflected on this statement, and would have pulled down the supposed profit. They owed the bank $20,000 on a promissory note. There was a note payable to M. M. Jewett for $34,968.30. There was also a deed of trust securing a note to the Bank of San Jose, for $20,000. There was a "surplus deficit," which means that the capital had been impaired to the extent of $21,016.17. There is also an interest charge of $5,644.48, none of which is allocated in this statement for the first six months. Also the item of rent is credited entirely to the first six months, whereas a part of it should be allocated to the balance of the year. After Mr. Col was appointed receiver I did not notice any difference in the business. I simply noticed Mr. Col in the office, and the business went on as usual. In addition to

(Testimony of E. M. Rosenthal.)

the $20,000 due the bank on the unsecured promissory note, the plaintiff was overdrawn to the extent of $3,886.27 when Mr. Col was appointed receiver. Likewise there were accounts payable amounting to $17,724. The sales for the year 1924 were $551,-256.35. For the year 1925, which was the year of the receivership, the sales were $621,977.64, or about $70,000.00 more than the preceding year. In other words, they sold $70,000.00 more merchandise in the year of the receivership than during the preceding year. The sales for the last six months of the year 1925 were $301,334.50, which was more than the sales of the first six months of the year. A supposed profit for the first five or six months of the year includes an item of $2,700.00 [80] for the rental of some adjoining premises which was not a profit of the business at all. The discounts and allowances were not charged to the first half of the year on the statement made on July 1st, and they amounted for the year to $2,150.96. The purchases of the firm for the first six months of 1925 were $248,470.72, and for the last six months they were $264,718.00. In other words they purchased $16,-000.00 more merchandise in the six months following the receivership than in the six months prior.

Cross-examination.

Mr. SHEFFEY.—Q. Mr. Rosenthal, in the action entitled California Sweet Potato Corporation, a corporation, vs. L. E. Bontz, et al., in the Superior Court of Santa Clara County, in which the receiver

(Testimony of E. M. Rosenthal.)

was appointed, you made an affidavit, did you not, in support of the motion of the A. G. Col Company, Inc., to have the receiver A. G. Col discharged?

A. I may have done so. I don't remember it. If you have it here I can tell you.

Q. I will ask you if that is your affidavit?

A. Yes.

Q. Sworn to by you? A. Yes.

Q. The statements contained in that affidavit are true?

A. I suppose they are. I don't know what is in there. I think at the time I believed they were true.

Q. You would not make an affidavit unless it were true, would you? A. I would not.

Mr. SHEFFEY.—I wish to read this in evidence to the jury, your Honor. It is a two-page affidavit. I will read it all. [81]

In the Superior Court of the State of California, in and for the County of Santa Clara.

No. 31,959.

CALIFORNIA SWEET POTATO CORPORATION, a Corporation,

Plaintiff,

vs.

L. E. BONTZ et al.,

Defendants.

AFFIDAVIT OF E. M. ROSENTHAL.

State of California,
County of Santa Clara,—ss.

E. M. Rosenthal, being first duly sworn, deposes and says:

That he was, from the date of incorporation of the A. G. Col Company, Incorporated, a corporation, duly appointed auditor, and continued so up to and including the 29th day of June, 1925;

That on the audit made on the first day of June, A. D. 1925, there was disclosed total sales for that five months ending May 31st, 1925, $255,911.48;

That the cost of goods sold was $189,737.31;

Leaving a gross profit on sales of $66,174.17.

The operating expenses for said period of five months being $50,579.36;

Leaving a net profit for the operation of said corporation for said five months of $15,594.81.

That the balance sheet on said 31st day of May, 1925, discloses Quick Assets amounting to $83,-507.51; fixed assets of $70,926.95; and a Net Worth of said corporation, over all its liabilities, of $54,578.64.

That the balance sheet discloses a healthy financial condition of said corporation; that the business has been transacted during the last five months, up to the 29th day of June, 1925, in a careful and conservative and businesslike manner.

That all income is daily deposited in the Bank of San Jose, and is disbursed by check of the corpora-

(Testimony of E. M. Rosenthal.)

tion, only for its operating expenses and for the purchase of produce which it handles.

This mode of carrying on the business has been continued right up to the 29th day of June, 1925, and up to the appointment of the Receiver herein; that no departure in its [82] regular routine of depositing all income and collections, and not using said moneys for other than legitimate operating expenses of the corporation, or legitimate and necessary purchases of merchandise has been made at any time up to the appointment of the Receiver herein.

And that an examination of the accounts from the first day of June, up to the 29th day of June, 1925, discloses no change or departure from the regular daily deposits of al moneys received and the purchase of merchandise, not in excess of any expenses paid, or merchandise purchased, than was paid or purchased prior to the date of the filing of the complaint herein.

(Sgd.) E. M. ROSENTHAL.

Subscribed and sworn to before me this 1st day of July, 1925.

HENRY A. PFISTER,
County Clerk.
By R. I. McCARTHY,
Deputy.

Redirect Examination.

The affidavit was prepared, just as the balance sheet was prepared, on figures that were given to me, but did not take into account any allowance for

(Testimony of E. M. Rosenthal.)

perishable assets, depreciation, bad debts or interest accounts, or even a loss or gain in the inventory.

Recross-examination.

I made this affidavit at your request and to try and get the receiver out.

TESTIMONY OF A. G. COL, FOR DEFENDANT.

A. G. Col, called as a witness for the defendant, being duly sworn, testified as follows:

I live in San Jose, and have lived there over forty years, and I am the A. G. Col referred to in the bond in this case, and I have been spoken of as the receiver. The order appointing me was made June 30, 1925, and I was in acting as receiver about a day and a half. I stopped payment on the checks shown by Mr. Jewett in his testimony, because the books of the plaintiff showed an overdraft of pretty close to $4,000.00. There was not [83] enough money in the bank to meet these checks, and the checks had been drawn without the money being there, and I stopped payment to avoid having them come back because of lack of sufficient funds. I purchased goods from the firm mentioned in the checks on the regular terms just as goods had been purchased before.

Mr. ALEXANDER.—Q. After the receivership, or after you were appointed receiver and during the following month or two, was there any difficulty in buying goods?

(Testimony of A. G. Col.)

Mr. SHEFFEY.—We object to that, your Honor. This witness had no connection with the business after he was discharged as receiver.

The COURT.—Q. Is that true? After you were discharged as receiver did you have any further connection with the concern, at all?

A. No.

The COURT.—Objection sustained.

Mr. ALEXANDER.—Q. Were you familiar with the affairs of the concern after the receivership?

A. Yes.

Q. Did you keep in close touch with it?

A. Yes.

Mr. SHEFFEY.—We object to that, your Honor.

Mr. ALEXANDER.—Q. At the time you were appointed receiver in the suit brought by the California Sweet Potato Corporation, you were a stockholder, were you not, in that corporation?

A. I was up to that morning, yes.

Q. And up to the time of your appointment?

A. Yes.

Q. On the 3d day of July, 1925, it is a fact, is it not, that you filed an account with the Court, in the Superior Court of Santa Clara County? A. Yes.

Q. I will ask you to look at this document. I am referring to a document marked "Filed in the Superior Court of Santa Clara County," in that action, No. 31,959, and marked "Report of A. G. [84] Col as receiver," and ask you if that was your report which was filed. A. Yes.

Mr. ALEXANDER.—We will offer this in evidence and ask that it be deemed read in evidence.

Mr. SHEFFEY.—We object to that, because there is no showing that the report was furnished or given upon an opportunity for the corporation, the A. G. Col Company, Inc., to be heard. As a matter of fact there was no such hearing. The account was presented to the Court without any opportunity to the corporation to be heard in the matter.

The COURT.—What bearing has it?

Mr. ALEXANDER.—I am going to follow it up by presenting the order approving the account and exonerating the receiver and his surety from that date.

Mr. SHEFFEY.—I object to it as immaterial, irrelevant and incompetent.

The COURT.—Objection sustained. Exception.

Mr. ALEXANDER.—We ask to have it identified in the record, your Honor.

The COURT.—Very well.

The document offered in evidence and refused admission as testimony is in words and figures as follows:

In the Superior Court of the State of California in and for the County of Santa Clara.

No. 31,959.

CALIFORNIA SWEET POTATO CORPORATION, a Corporation,

Plaintiff,

vs.

L. E. BONTZ et al.,

Defendants.

REPORT OF A. G. COL AS RECEIVER. [85]

To the Superior Court of the State of California, in and for the County of Santa Clara:

The report of A. G. Col respectfully shows:

That on June 30, 1925, he was appointed by *ex parte* application receiver on the property and enterprise operated by the A. G. Col Company, Inc., on the west side of St. James Street, between Market and San Pedro Streets. in San Jose, California, and thereupon, and at the hour of about four o'clock P. M. he qualified and entered upon his duties as such receiver.

That with the assistance of the regular employees, he proceeded to take an inventory of the wares, goods and merchandise on hand at said plant and enterprise, and also employed an independent audtior to prepare a statement of the condition of the books of said corporation.

That thereafter, and on July 1, 1925, about 11 o'clock A. M., he was served with subpoena in the

above-entitled court and caused to appear in said court at 2 o'clock P. M. on said July 1st, 1925, and testify in behalf of a motion then pending made by the defendants seeking to set aside the order appointing him as receiver.

In obedience to said subpoena, this receiver appeared in court at 2 o'clock on said July 1, 1925, and was present in court during all of the afternoon on said day, and during the course of said hearing, it was stipulated in open court that an order be made vacating and setting aside the order made on June 30, 1925, appointing him as receiver herein, and that Joseph P. Napoli be appointed receiver in said cause, and that immediate possession of said property be given said Joseph P. Napoli, upon the understanding that he would on the following day qualify and give a bond in the sum of $10,000.00.

That on July 2, 1925, said Joseph P. Napoli duly qualified as such receiver. In obedience to said stipulation and order of the Court made in harmony therewith, the undersigned, A. G. Col, turned over all of the property and assets and possession of said plant to Joseph P. Napoli, and on July 2, 1925, after his qualification as such receiver, took his receipt for same, which is hereto attached and made a part of this report.

That the following expenses have been incurred by the undersigned in connection with said appointment, namely:

Johnson & Temple, premium or temporary bond $2.50

County Clerk, 2 copies of order of appointment 1.20

[86]

Sheriff's office, San Jose, serving of order of appointment on J. G. Jewett, Manager of A. G. Col Co., Inc. ..... .75

Total $4.45

Auditor's statement has not been completed, nor has his bill been presented. The plaintiff above named and Joseph P. Napoli have reimbursed the undersigned respecting the above expenditures, and have assumed the payment of the account of the auditor.

That the undersigned waived all right to compensation for his services in this matter.

Wherefore, the undersigned prays that this report be approved and he be formally discharged as receiver and his bond exonerated.

A. G. COL,
Receiver.

Dated: July 3d, 1925.

State of California,
County of Santa Clara,—ss.

A. G. Col, being first duly sworn, deposes and says:

That he is the receiver in the above and foregoing report; that he has read the same and that the same is true and correct in all respects and that

it contains a true and correct statement of all moneys received and paid out by him in any manner in connection with said receivership.

A. G. COL.

Subscribed and sworn to before me this 3d day of July, 1925.

N. E. WRETMAN,
Notary Public in and for the County of Santa Clara, State of California.

This is to certify that I am in possession of the plant of A. G. Col Company referred to and briefly described in the above and foregoing report; having received possession of same from A. G. Col, my predecessor as receiver, and I hereby assume the payment of the items mentioned and referred to in the above and foregoing report.

JOSEPH P. NAPOLI.

State of California,
County of Santa Clara,—ss.

On this 3d day of July, in the year one thousand nine hundred and twenty-five, before me, N. E. Wretman, a Notary Public in and for the said county of Santa Clara, State of California, residing therein, duly commissioned and sworn, personally appeared Joseph P. Napoli, and known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same. [87]

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal at my office in

the said county of Santa Clara, the day and year in this certificate first above written.

[Seal] N. E. WRETMAN,
Notary Public in and for the County of Santa Clara, State of California.

My commission expires March 24, 1929.

Mr. ALEXANDER.—I offer in evidence the order of Judge Welch, under date of July 3, 1925, in that same action, approving the report of the receiver, accepting his account, and exonerating him and his surety, that is the defendant in this action, from further responsibility.

Mr. SHEFFEY.—I renew my objection to that as immaterial, irrelevant and incompetent, and I want the jury to be instructed to disregard Mr. Alexander's statement that it is an order exonerating the surety bond in this action.

The COURT.—As a matter of fact, it did exonerate the surety. It would be an exoneration as to any damages incurred thereafter. I do not know that it would affect this suit. You claim damages as the result of the wrongful appointment of a receiver. Any damage that was caused the plaintiff in this action on account of the wrongful appointment you would be entitled to recover, if there were any such damages. The jury will understand that the objection to this document is sustained and an exception noted. Where evidence is offered and an objection is sustained and it is not admitted, it is not a proper subject matter for your attention and consideration; in other words, you are to dis-

regard any inference that might be drawn from the offer. It is not evidence, and is not to be considered by you. [88]

The order of Judge Welch, under date of July 3, 1925, which was offered in evidence by the defendant and refused admission as evidence, is in words and figures as follows:

In the Superior Court of the State of California in and for the County of Santa Clara.

No. 31,959.

CALIFORNIA SWEET POTATO CORPORATION, a Corporation,

Plaintiff,

vs.

L. E. BONTZ et al.,

Defendants.

ORDER APPROVING REPORT AND DISCHARGE OF RECEIVER.

Upon examining and filing the report of A. G. Col as receiver in the above-entitled action, and it appearing to the Court that said report is true and correct in all respects, and that Joseph P. Napoli has qualified as receiver, and is now in possession of said property, and has assumed the payment of any small items of expense incurred by said A. G. Col, and that said A. G. Col has waived all compensation as receiver herein, and that it is proper that he be formally discharged and his surety exonerated,

(Testimony of A. G. Col.)

NOW THEREFORE it is hereby ordered that said A. G. Col, pursuant to stipulations referred to in his report and the order of Court heretofore filed herein, be and he is hereby discharged and relieved from any further duties and responsibilities herein and his surety exonerated.

J. R. WELCH,
Judge.

Dated: July 3d, 1925.

Mr. ALEXANDER.—There has been a question here as to the length of time the receiver was acting. It is settled by this document. It shows the date of his discharge.

The COURT.—What is the date of the discharge?

Mr. ALEXANDER.—This is July 3d, 1925.

Mr. SHEFFEY.—I will stipulate that that was the date that the receiver, Mr. Col, was discharged.

Mr. ALEXANDER.—Your Honor ruled against the admission of this document?

The COURT.—Yes, and an exception is noted. [89]

Mr. ALEXANDER.—I also want to have this identified in the record, so it will show that I offered. It is labeled, "Order approving report and discharge of receiver, Filed July 3, 1925."

At the time the checks were paid and I stopped payment, there was only $54.00 in the bank. After I became receiver I arranged for funds so the checks could be paid, and they were paid later on. I simply went to the bank and told them to hold

(Testimony of A. G. Col.)

them until we could make them good. They were made good later on.

Mr. ALEXANDER.—Q. At the time you were appointed receiver, do you know what the condition of the business of the firm was?

Mr. SHEFFEY.—I object to that, your Honor, as calling for the conclusion of the witness, and, furthermore, calling for hearsay testimony. He had no connection with the business prior to his appointment as receiver, and had not had for a number of years previous to his connection terminating with his discharge.

The COURT.—I think that ultimately the objection will be good, but I will overrule it at this time. The question is, Do you know what the condition of the concern was at the time specified? Do you or do you not know?

A. Well, I knew they were in bad shape.

Mr. SHEFFEY.—I ask that that answer go out as not responsive to the question.

The COURT.—Motion granted. Exception.

Mr. ALEXANDER.—Q. Do you know what the condition of its credit was at that time?

A. Poor.

Mr. SHEFFEY.—The same objection.

The COURT.—I will strike out the answer. Exception. The jury will disregard the answer of the witness. [90]

Mr. SHEFFEY.—Q. You merely stopped payment on the checks, didn't you, Mr. Col? You took

(Testimony of A. G. Col.)

no action to pay the indebtedness for which the checks were issued, did you?

A. No, sir.

Q. Did you purchase any merchandise for this business during the time that you were receiver?

A. No, sir.

Q. In reference to this bank overdraft, do you know whether or not on that day the deposits on the 30th of June were taken into consideration in calculating that overdraft?

A. You mean the overdraft at the time that I stepped into the receivership?

Q. Yes. Do you know whether the deposits on that day had been calculated in figuring the overdraft? A. I think so.

Q. Do you know?

A. I don't remember. We balanced up the cash at four o'clock in the afternoon when I stepped in as receiver. We balanced up everything.

Q. What were the deposits on the 30th day of June, 1925? A. I don't remember.

Q. You do not? A. No.

Q. Did you ever know?

A. I had the books at the time.

Q. You had the books at the time? A. Yes.

Q. You also testified at the hearing that we had before Judge Welch to secure your discharge as receiver, did you not? A. I did, yes.

Q. I want to read your testimony—

Mr. ALEXANDER.—Pardon me, let me see it first, and let him see it.

(Testimony of A. G. Col.)

Mr. SHEFFEY.—Q. I will read your testimony that you gave in the hearing before Judge Welch, in Santa Clara County, on July 1st, reading from page 52 of the transcript, as follows:

"Q. Have you the bank book of the A. G. Col Company? A. Yes, sir." [91]

Then I will skip certain controversy between the attorneys.

"Q. What does the bank book show for relative collections at the end of the different months, say for the last several amounts, compared with the amount of collections at the end of June, 1925."

Then there were certain objections made by the attorneys, and then this question was asked:

"Q. Take the last few days of each month, right along.

"A. A little over $9,000 deposited yesterday, the last day of the month.

"Q. Before you took charge?

"A. Yes. There was a little over $9,000.

"Q. June 30? A. June 30, $9,044.78."

That testimony was correct, was it not, Mr. Col?

A. Yes.

Q. On the 30th day of June, this company deposited over $9,000. Did you make any investigation after you stopped payment on their checks to determine whether or not that deposit would take care of the overdraft on the books of the company?

A. No, sir; there was an overdraft besides that.

Q. Besides that? A. Yes.

(Testimony of A. G. Col.)

Q. Do you know what moneys were deposited on the days subsequent to the 30th day of June?

A. No, sir.

Q. Did you make any investigation?

A. Yes, sir.

Q. Is it not a fact, Mr. Col, that you went to the bank and stopped payment on the checks of the company before you ever went to the business?

A. No, sir.

Q. Is it not? A. No, sir.

Q. Is it not a fact that as soon as the order appointing you receiver was made, the first place you went was to the bank, [92] to stop payment on the checks? A. No, sir.

Q. It is not? A. No, sir.

Q. Do you know how much money was deposited in the bank by this company on the 2d day of July?

A. No, sir.

Cross-examination.

Mr. SHEFFEY.—I wish to offer in evidence, your Honor, a statement filed by Joseph P. Napoli, as receiver, on the 27th day of July, 1926, which statement contains—

Mr. ALEXANDER.—Now, just a moment. Before you state the contents I want to make an objection and have a ruling on it.

Mr. SHEFFEY.—The statement contains—

Mr. ALEXANDER.—Pardon me, I want to object before this is read. I object to any report made by Mr. Napoli on July 27, 1926, upon the

ground that it is hearsay, immaterial, irrelevant, and incompetent, and not binding on the defendant in this action. It is a statement made by him a year later.

Mr. SHEFFEY.—It contains a statement beginning July 2d, 1925.

The COURT.—In that statement 1925 is covered, is it?

Mr. SHEFFEY.—Yes, your Honor.

Mr. ALEXANDER.—It covers a period apparently subsequent to the time Mr. Col ceased to be receiver. It is clearly hearsay.

Mr. SHEFFEY.—It shows what was done on the 2d day of July, 1925.

The COURT.—Objection overruled. Exception.

Mr. SHEFFEY.—Q. The report of Mr. Joseph P. Napoli, as receiver, shows that there was deposited on behalf of this company on the 2d day of July $4,184.92. [93]

Mr. SHEFFEY.—*Q.* Prior to the 11th day of August, 1922, you, Mr. J. P. Napoli and Mr. D. A. Bechetti owned practically all of the corporate stock of the A. G. Col Company of San Jose, did you not?

Mr. ALEXANDER,—To which we object as not being cross-examination, and not being covered in any way by our direct examination.

The COURT.—What is the object of this?

Mr. SHEFFEY.—The object is to impeach this witness and to show his interest.

The COURT.—To show his interest?

(Testimony of A. G. Col.)

Mr. SHEFFEY.—To show his interest, yes, your Honor.

The COURT.—Objection overruled. Exception.

A. Yes, sir.

Mr. ALEXANDER.—We further object to that on the ground the A. G. Col Company is a different corporation, and not the plaintiff in this action.

The COURT.—The same ruling and exception.

Mr. SHEFFEY.—Q. You were president and manager of that corporation, were you not?

Mr. ALEXANDER.—The same objection.

The COURT.—The same ruling and exception.

A. Yes.

Mr. SHEFFEY.—Q. At the time you were appointed receiver, you were a stockholder of the California Sweet Potato Corporation, were you not?

A. Yes.

Q. You were the largest individual stockholder in the California Sweet Potato Corporation, were you not? A. I don't think so.

Q. You owned 200 shares of the capital stock, didn't you? A. Yes. [94]

TESTIMONY OF JOSEPH P. NAPOLI, FOR DEFENDANT.

JOSEPH P. NAPOLI, called as a witness for the defendant, being duly sworn, testified as follows:

I live in San Jose, and have lived there about

(Testimony of Joseph P. Napoli.)

thirty-five years. I became associated with A. G. Col Company about 1920. When we sold out to the new firm, I stayed until 1925, when I resigned in the month of February. In the early part of July I became receiver of the A. G. Col Company, Inc., and took charge as receiver I think on the 3d of July, 1925. I was thoroughly familiar with the business. The biggest months of the year are April, May and June, and then it starts to slack down up to September. When I came in as receiver, the financial condition was very poor, as the concern was very short of funds in the bank.

Cross-examination.

Mr. SHEFFEY.—Q. Did you do any of the buying, Mr. Napoli?

A. No, sir.

Q. You did not? A. No, sir.

Q. So, all you know then, about what was bought and from whom it was bought was from what was told you. Is that not true?

A. Mr. Parker is the gentleman who used to tell me, and then what I heard in the commission houses, that Mr. Jewett was doing the buying from the same people, and I never heard that they had any difficulty in the buying or the selling.

Q. What people were Mr. Jewett buying from?

A. I could not tell you.

Q. You didn't know?

A. No, I didn't know all the firms.

(Testimony of Joseph P. Napoli.)

Q. What firms was he buying from prior to the 3d day of July, 1925? A. I could not tell you. [95]

Q. What firms was he buying from after the 3d of July, 1925? A. I could not tell you.

Q. When you testify they could buy from the same firms after the 3d of July as they bought from before the 3d of July, you don't know that, do you?

A. What I mean to say by that is that the business was not disturbed at all—

Q. Just a moment, Mr. Napoli, just answer my question.

A. Mr. Jewett was doing the buying, and I don't think they had any trouble, at all. If they did, I would know.

Q. What would you know?

A. Mr. Jewett would tell me, and Mr. Parker would tell me.

Q. The reason that you say they had no trouble is because you were not told. You had nothing to do with the buying, yourself, did you?

A. No, sir.

Q. Did you have anything to do with arranging the credit for the firm with the banks, or with any of the produce houses?

A. The only thing I had to do was to sign the checks, and to bank the money daily; that is all I had to do. I paid the bills. But I don't know the conditions.

Q. You had nothing to do with arranging terms of credit with any one for the firm, did you?

(Testimony of Joseph P. Napoli.)

A. No, sir.

Q. So that all you know in that regard is hearsay, is it not? A. That is all.

Mr. SHEFFEY.—At this time, your Honor, I ask that this witness' testimony to the effect that the firm had no difficulty in buying, *no further difficulty in buying* after he was appointed receiver than it did have before, and that it could buy goods upon the same terms of credit, be stricken from the record as hearsay, and the jury instructed to disregard it.

Mr. ALEXANDER.—We resist that upon the ground that his information came from officers and employees of the concern [96] in the course of its business.

The COURT.—He said they had no trouble buying goods. He said he did not hear of any trouble. He does not know of his own knowledge whether they had any trouble buying goods. He said they had no trouble getting any credit; he does not know that of his own knowledge. He did not hear it if there was any trouble. That is all his testimony amounts to. As to the testimony just referred to, the motion to strike out will be granted. Exception noted.

Mr. SHEFFEY.—That is all.

TESTIMONY OF CARL S. PARKER, FOR DEFENDANT (RECALLED).

CARL S. PARKER, recalled as a witness for the defendant, testified as follows:

After the receivership the terms of credit were the same as they had been before. I base that upon my actual knowledge and what the books show. There was no difference in the terms of credit. I drew all checks, I paid all bills. Before the appointment of a receiver we had been accustomed to pay on steamer days, the 13th and 28th of the month, and the same was true after the receiver was appointed.

Cross-examination.

Mr. SHEFFEY.—Q. You had nothing to do with the buying of the goods?

A. I did not.

Q. Nothing to do except keep the books?

A. That was all.

Q. You don't know what arrangements the buyers for the firm made for the purchase of goods, do you? A. Except through correspondence.

Q. You don't know of your own knowledge?

A. No.

Q. You made none, yourself? A. No. [97]

TESTIMONY OF FRANK C. NAPOLI, FOR DEFENDANT.

FRANK C. NAPOLI, called as a witness for the defendant, being duly sworn, testified as follows:

Direct Examination.

My father was the receiver and I was connected with the plaintiff during the year 1925. I was selling for them. I was in touch with the trade both before and after Mr. Col was appointed receiver. The receivership did not bother me a bit.

Cross-examination.

Mr. SHEFFEY.—Q. You were only a salesman for the A. C. Col Company, Inc., were you not?

A. That is all.

Q. You did not do any buying? A. No, sir.

Q. You did not make any arrangements for credit with the firm? A. No, sir.

Q. Made no collections?

A. I collected from the stores I called on.

Q. And all your knowledge is with reference to the selling end? A. That is all.

TESTIMONY OF RAY COL, FOR DEFENDANT.

RAY COL, called as a witness for the defendant, being duly sworn, testified as follows:

Direct Examination.

I live in San Jose, and was connected with the

(Testimony of Ray Col.)

plaintiff both before and after my father was appointed receiver. I was a salesman. The receivership had no effect upon my trade.

Cross-examination.

Mr. SHEFFEY.—Q. You were only a salesman?

A. Yes. [98]

Q. That was the extent of your duty?

A. Yes.

Q. You did no buying for the firm? A. No.

Mr. ALEXANDER.—At this time, your Honor, I want to show that the only bond given in respect to Mr. Col's receivership is the bond sued upon. I have the records here. Counsel has brought the records from the Superior Court. Is that admitted, Mr. Sheffey, or shall I prove it?

Mr. SHEFFEY.—I admit that we are only suing upon the bond that had been offered in evidence.

Mr. ALEXANDER.—And do you admit that there was no other bond with respect to Mr. Col's receivership, or preceding the one sued upon?

Mr. SHEFFEY.—Yes.

Mr. ALEXANDER.—I want to offer in evidence the order appointing Mr. Napoli receiver. It may be in already.

The COURT.—The evidence already shows, without dispute, that Mr. Napoli was appointed.

Mr. ALEXANDER.—Then we ask that there be deemed read in evidence the order of Judge Welch, dated July 1, 1925, appointing him, and terminating Mr. Col as receiver.

Mr. SHEFFEY.—I object to that statement.

Mr. ALEXANDER.—I withdraw the statement. I ask that the order be deemed in evidence and considered read.

The COURT.—All right. It is so ordered.

The order is in words and figures as follows: [99]

In the Superior Court of the State of California in and for the County of Santa Clara.

No. 31,959.

CALIFORNIA SWEET POTATO CORPORATION, a Corporation,

Plaintiff,

vs.

L. E. BONTZ et al.,

Defendants.

ORDER APPOINTING RECEIVER.

The motion of defendants, A. G. Col Company, Inc., and A. G. Col Company, a corporation, for an order setting aside the appointment of A. G. Col as receiver of the property and enterprise described in the complaint on file in this action came on regularly to be heard before this Court on July 1st, 1925, at 2 o'clock p. m., Simeon E. Sheffey, Esquire, appearing for said defendant, and W. E. Foley and N. E. Wretman, Esquires, appearing as attorneys for the plaintiff.

The attention of the Court was called to the notice of motion for the appointment of a receiver,

heretofore served upon the defendants, fixing July 3rd, 1925, at ten o'clock A. M. in this Court as time for the hearing on said motion, and it was suggested by counsel for the plaintiff that the present motion be continued until Friday, July 3d, 1925.

It was stipulated in open court that all matters relating to the appointment of a receiver be taken up in connection with the motion of said defendants. Said defendants thereupon introduced testimony, both oral and documentary, and the plaintiff asked for a continuance so as to enable it to take the depositions of E. L. Jewett, L. E. Bontz, C. W. Hunt and R. A. Bronson. Thereupon all parties agreed and stipulated in open court that the order heretofore made appointing A. G. Col as receiver may be and the same is hereby vacated and set aside and that Joseph P. Napoli of San Jose, California, be and he is hereby appointed receiver *pendenti lite* of the property and enterprise described in the complaint on file in this action, consisting of the Wholesale Fruit & Produce, Warehouse and Commission business, trucks, and delivery wagons, goods, wares and merchandise on the premises situated on the west side of St. James Street, between Market and San Pedro Streets, in the city of San Jose, County of Santa Clara, State of California, now operated under and in the name of A. G. Col Company, Inc.

That all moneys received in connection with said business and enterprise shall be deposited with the Bank of San Jose, San Jose, California, and checks

drawn on same shall be signed by J. C. Jewett, Grant J. Hunt, and Joseph P. Napoli.

That said Joseph P. Napoli, as such receiver, shall permit the officers and employee of said A. G. Col Company, Inc., to manage and operate said business and enterprise in the same general manner that they have heretofore managed and operated the same until the further order of this Court, it being the intent and purpose of this order to give as much liberty as possible to the officers of A. G. [100] Col Company, Inc., in the management and operation of said business as is consistent with the conservation of the liquid assets thereof pending the final determination of this action.

IT IS FURTHER ORDERED, that said receiver give an undertaking in the sum of Ten Thousand ($10,000) Dollars, surety company bond, condition to the effect that he will faithfully discharge and perform the duties of receiver in said action, and will obey the orders of the Court herein.

Dated: July 1st, 1925.

J. R. WELCH,
Judge.

[Endorsed]: Filed Jul. 2, 1925. Henry A. Pfister, Clerk. By R. I. McCarthy, Deputy.

The defendant thereupon rested.

Mr. SHEFFEY.—Plaintiff rests.

Mr. ALEXANDER.—At this time, in compliance with the rules on behalf of the defendant I am moving for a directed verdict, and I will state my

points and authorities briefly. The points are these:

It appears in this case that in the Col receivership there was Col's bond as receiver, which is in evidence in this case as the bond sued upon. That bond recites that Col had been appointed receiver, and in compliance with the order he was qualifying, and he was giving a bond. It does not appear, and, in fact, it is admitted, there is no other bond, there was no applicant's bond filed in this case pursuant to the requirements of section 566 of the Code of Civil Procedure. For that reason, as I will show your Honor in a moment by the authorities, the proceeding is void.

The second ground is this: It appears in this case that Mr. Col was a stockholder in this corporation, and, under section 566 could not be appointed receiver. That is commented upon by the Supreme Court in the very case which counsel put in evidence, reported in 196 Cal. 604. As a result, the Supreme Court reached [101] the conclusion in this proceeding that the Court had no jurisdiction to appoint the receiver. They so held specifically, and, consequently annulled every order that had been made in regard to it, not because of error, but because of lack of jurisdiction. Mr. Sheffey applied to the Supreme Court for a writ of prohibition involving the jurisdiction of the Superior Court, and the Supreme Court maintained his contention that there was no jurisdiction, on that ground.

So, for these two reasons, it appears here there was no jurisdiction to appoint the receiver, and the decision of the Supreme Court brings about the result that the consideration for the bond failed, and no recovery can be had upon it.

In addition to that, we call attention to the additional points: There has been no showing that any loss was established by any accounting in the Court appointing the receiver, which we contend is a condition precedent to the maintenance of this action.

Furthermore, no attempt has been made to exhaust any remedy against the principal upon the bond; under the doctrine set forth in 34 Cyc. 508, we maintain that that is a condition precedent.

For these reasons, your Honor, we maintan that the proceeding was a void one, and also that the conditions precedent have not been complied with. As the order was a void one, no suit can be maintained upon this bond. For these reasons we ask for a directed verdict in favor of the defendant.

The COURT.—The motion is denied. Exception noted. [102]

The foregoing constituted all of the evidence given in the trial of said action.

The defendant thereupon requested the Court to instruct the jury as follows, but the Court refused to give each of the following instructions, to which defendant duly excepted. The instructions which were refused are as follows:

DEFENDANT'S INSTRUCTIONS WHICH WERE REFUSED.

1. I instruct you to return a verdict in favor of the defendant. Taylor vs. Exnicious, 197 Cal. 443.

2. The Superior Court of Santa Clara County did not have any authority to appoint a stockholder of the California Sweet Potato Company as its receiver. If you find that Mr. A. G. Col was a stockholder in the California Sweet Potato Company at the time the Court appointed him receiver of that corporation, then the order appointing him was void. And if the order was void, the plaintiff in this action cannot maintain any action upon the bond, and your verdict should be in favor of the defendant Fidelity and Deposit Company of Maryland. Code of Civil Procedure of California, Section 566; Taylor vs. Exnicious, 197 Cal. 443.

3. If you find that the order appointing Mr. A. G. Col the receiver of the California Sweet Potato Company was annulled by the Supreme Court of the State of California because the Superior Court had no authority to appoint Mr. Col receiver, then you must decide this case in favor of the defendant, Fidelity and Deposit Company of Maryland, and no damages should be awarded against it. Taylor vs. Exnicious, 197 Cal. 443. [103]

4. If you find that the appointment of A. G. Col as receiver was not made wrongfully or maliciously or without just cause, and if you also find

that Mr. Col. faithfully performed all of his duties as receiver, then you must decide the case in favor of the defendant Fidelity and Deposit Company of Maryland, and you cannot award any damages to the plaintiff A. G. Col Company, Inc.

5. I instruct you that you cannot award any damages in this case merely because Mr. Col was appointed to the office of receiver. Unless you find that the appointment of Mr. Col as receiver was procured wrongfully or maliciously or without just cause, or unless you find that Mr. Col did not faithfully perform all of the duties of his office as receiver, then your verdict must be in favor of the defendant Fidelity and Deposit Company of Maryland, and you cannot award any damages to the plaintiff A. G. Col Company, Inc.

6. If you find that the plaintiff A. G. Col Company, Inc., did not sustain any loss or damage by reason of the receivership of Mr. A. G. Col, then this is a complete exoneration of the defendant Fidelity and Deposit Company of Maryland, and your verdict should be in its favor.

7. It is immaterial whether any damage was caused by the appointment of Joseph P. Napoli as receiver, for that issue is not involved in this case. If no damage to plaintiff corporation was caused by the appointment of Mr. Col as receiver, then no damages can be recovered by the plaintiff in this case, and your verdict should be in favor of the defendant Fidelity and Deposit Company of Maryland. [104]

8. If you find that Mr. A. G. Col's accounts were examined by the Superior Court of the State of California, in and for the county of Santa Clara, and if you also find that His Honor Judge J. R. Welch, Judge of the Superior Court of Santa Clara County, made an order finding that Mr. Col's accounts were true and correct in all respects, then you must accept this finding to be the fact. That is to say, if Judge Welch found Mr. Col's accounts to be true and correct, you must accept that finding as being a true one.

9. I instruct you that on the 3d day of July, 1925, the Superior Court of the State of California, in and for the county of Santa Clara, made an order exonerating the defendant Fidelity and Deposit Company of Maryland from all liability subsequent to that date. Therefore you cannot award any damages to the plaintiff in this action which may have been sustained after the 3d day of July, 1925.

10. I instruct you that on the 3d day of July, 1925, His Honor, J. R. Welch, Judge of the Superior Court of the State of California, in and for the county of Santa Clara, made an order approving the report and accounts of Mr. Col, which order reads as follows:

"Upon examining and filing the report of A. G. Col as receiver in the above-entitled action, and it appearing to the Court that said report is true and correct in all respects, and that Joseph P. Napoli has qualified as receiver, and is now in possession of said property, and has assumed the payment of any small items of expense incurred by said A. G. Col,

and that said A. G. Col has waived all compensation as receiver herein, and that it is proper that he be formally discharged and his surety exonerated,

NOW, THEREFORE, it is hereby ordered that said A. G. Col pursuant to stipulations referred to [105] in his report and the order of court heretofore filed herein, be and he is hereby discharged and relieved from any further duties and responsibilities herein and his surety exonerated.

Dated: July 3d, 1925.

J. R. WELCH,
Judge."

You must accept this order of Judge Welch as true and correct in all respects, and binding upon plaintiff in this action.

11. If the Superior Court of Santa Clara County did not have jurisdiction to make an order appointing Mr. A. G. Col as receiver, then the bond sued upon in this case is null and void and you must not award any damages against the defendant Fidelity and Deposit Company of Maryland, for under such circumstances your verdict should be in its favor. Taylor vs. Exnicious, 197 Cal. 443.

12. If you find that the plaintiff A. G. Col Company, Inc., did not sustain any loss or profits by reason of Mr. Col's receivership, then you must not award any damages for the loss of profits.

13. If you find that A. G. Col Company, Inc., did not lose any credit or goodwill of its business by reason of Mr. Col's receivership, then I instruct

you that you cannot award any damages for loss of credit or goodwill.

14. If you find that the Court appointing Mr. Col as receiver had no jurisdiction or legal power to do so, then I instruct you that the alleged bond sued upon was and is null and void and the plaintiff is not entitled to recover any damages upon it, and your verdict in such case must be in favor of the defendant Fidelity and Deposit Company of Maryland. [106]

15. I instruct you that a suit cannot be maintained *o*pon the bond in this case unless the plaintiff previously secured an order from the Superior Court of California permitting the action to be brought. It is not sufficient for the plaintiff to have an order signed by a Judge of the Superior Court. For such order would not be valid unless the Fidelity and Deposit Company of Maryland had notice that the plaintiff intended to apply for such an order or was present when the order was made and had an opportunity to be heard. But if you find that the order was procured in the absence of the defendant Fidelity and Deposit Company of Maryland, and if you also find that the Fidelity and Deposit Company of Maryland did not have any notice of the time and place when such order would be applied for, then the order is void. And if you find that the order is void for want of such notice, then you must decide the case against the plaintiff, and you cannot award it any damages in this action. Thompson vs. Superior Court, 119 Cal. 538, at 543. McClatchy

vs. Superior Court, 119 Cal. 413, at 418–421. Political Code, Section 982; 46 C. J. 552.

16. In this action, you are not concerned with any damages which may have been caused by Mr. Napoli's receivership. Therefore, in deciding whether any damages were caused by Mr. Col's receivership, you must eliminate from consideration the damages, if any, caused by Mr. Napoli's receivership.

The Court instructed the jury as follows: and the instructions hereinafter set forth were the only instructions that were given: [107]

CHARGE TO THE JURY.

The COURT.—(Orally.) This is an action upon a receiver's bond which was executed by the defendant, Fidelity and Deposit Company of Maryland, in an action brought in the Superior Court of the State of California, entitled "California Sweet Potato Corporation, Plaintiff, vs. L. E. Bontz, et al., Defendants." This bond is in the sum of $5,000. The receiver, who was appointed, and who signed the bond concurrently with the defendant Fidelity and Deposit Company of Maryland, was A. G. Col. He was bonded as a receiver for the A. G. Col Company, Inc., who is the plaintiff in the action now before us. The penalty of the bond, in part, provides:

1. "The condition of this obligation is such that if the said A. G. Col and said surety shall well and

truly pay to the defendant all damages that all or any of them may sustain by reason of the appointment of said receiver in case the applicant shall have procured said appointment wrongfully, then the above obligation to be void, otherwise to remain in full force and effect."

2. You are also instructed that it has been decided by the Supreme Court of the State of California, whose decision is final on that point, that said receiver was wrongfully appointed. Therefore, it is not incumbent upon you to go into the question as to whether or not the appointment was wrongful.

3. You are instructed that there is only one issue in this matter for you to decide, and that is the amount of damage which plaintiff in this action suffered, if any, by reason of the wrongful appointment of the receiver for plaintiff's business.

4. The measure of damages, according to the law of the State of California, as applicable to this case, is the amount that will [108] compensate the plaintiff for all detriment, if any, proximately caused by the wrongful act of procuring the appointment of a receiver for plaintiff's business.

5. In estimating the amount of damage you may take into consideration the loss of actual profits, the money actually paid out for attorney's fees and costs incident to procuring the discharge of A. G. Col as receiver, the loss of credit and goodwill of said business, and any other items of loss proven to have been suffered by the plaintiff by reason of the appointment of A. G. Col as receiver.

6. Those are some of the elements that you may take into consideration if you should find for the plaintiff and against the defendant. And in this regard you may consider not only profits actually lost by plaintiff, but any profits which you believe that plaintiff reasonably would have made had not the receiver been appointed.

7. You are instructed that the bond which is the basis of this suit was executed by the defendant in form payable to the State of California, but you are instructed that plaintiff has done all things required by law necessary to authorize plaintiff to prosecute this action in its own name, and on its own behalf, as a party interested therein.

8. You are instructed that the goodwill of a business is the expectation of continued public patronage, and is property, transferable like any other property. Its loss, due to the wrongful act of another may be the subject of damages, and if you find that plaintiff in this action has suffered loss of good will to its business by reason of the wrongful appointment of a receiver, plaintiff is entitled to as much damages as will compensate plaintiff for such loss of its goodwill. [109]

9. You are further instructed that if you find that plaintiff was damaged by reason of the wrongful appointment of the receiver, that in addition to the damage plaintiff suffered by reason of such wrongful appointment, plaintiff may recover interest on such sums as were expended by plaintiff to procure the termination of the receivership of A. G. Col, including attorney's fees paid for that

specific purpose, if any. Such interest is to be computed from the date of the expenditure in question, at the rate of 7% per annum.

10. You are instructed that the penalty of defendant's bond is the sum of $5,000. This is the limit of defendant's liability, if any, for damages, general or special, except, however, if you find that plaintiff has suffered damages equal to $5,000, then there may be added to defendant's liability interest at the rate of seven per cent per annum on such sums as you may find that plaintiff expended to procure the termination of the receivership of A. G. Col from the date when such expenditures were made.

11. I instruct you that this suit concerns only the receivership of A. G. Col. The records show that he was the receiver for only a couple of days. You are only concerned with the loss or damage, if any, sustained by reason of the appointment of Mr. Col as receiver, and the entry by him into the office of receiver. This case does not concern the subsequent receivership of Joseph P. Napoli, and you are not concerned in this case with any loss or damage which may have been caused by reason of Mr. Napoli's receivership.

12. If you find that the plaintiff, A. G. Col Company, Inc., did not sustain any loss or damage by reason of the appointment of A. G. Col as its receiver, or by his entry upon the duties of receiver, then you cannot give any damages to the A. G. Col [110] Company, Inc., in this action, and your ver-

dict in this case must be for the defendant Fidelity and Deposit Company of Maryland.

13. If you find that on or prior to the 2nd day of July, 1925, Mr. Col ceased to be the receiver of the A. G. Col Company, Inc., and if you also find that the plaintiff A. G. Col Company, Inc., did not incur any attorney's fees or other expenses in order to procure the annullment of the order appointing Mr. Col receiver, then you cannot allow any attorney fees or other expenses for services in procuring the annullment of the order appointing Mr. Col receiver.

14. If Mr. Col had ceased to be the receiver before the plaintiff instituted proceedings in the Superior Court of the State of California, then you cannot award any damages for expenses or attorney fees incurred by the plaintiff on account of proceedings in the Supreme Court.

15. In order for the plaintiff in this action to recover any damages, it must prove by a preponderance of evidence that such damages were actually sustained. A mere surmise or conjecture that there may have been damages is not sufficient to sustain a verdict awarding damages.

16. I have given you certain instructions relating to the question of damages. I have given these instructions so that you may be informed upon all the legal phases of this case; but you must not think because I have given such instructions that it is my belief that you should award any damages in this case.

17. Damages in all cases must be reasonable in amount, if awarded at all.

Any exceptions?

Mr. SHEFFEY.—Plaintiff has no exceptions.

Mr. ALEXANDER.—Complying with the rule, I am excepting to [111] the instructions given at the request of the plaintiff. Instruction 1 does not give the contents of the bond, it does no*w* show that the bond is explicit.

Instruction 2. The decision of the Supreme Court does not relieve plaintiff from complying with the conditions specified.

Instruction 3. There is more than one issue in this case, one is whether the applicant for the appointment of a receiver ever gave a bond. The only issue is not the question of damages.

Instruction 4. Assumes that Mr. Col procured the appointment of the receiver, whereas the record shows that he was not the applicant in the suit in which the receiver was appointed.

Instruction 5. Allows the jury to take into consideration—

The COURT.—Just a moment. With reference to No. 4, I struck out a part of the proposed instruction.

Mr. ALEXANDER.—It is difficult to follow it entirely, your Honor. I am doing the best I can under the rule. It is a hard rule to follow.

The COURT.—Yes, I know it is, but you have to do it to preserve your rights.

Mr. ALEXANDER.—Yes, your Honor.

Instruction 5 allows the jury to take into consideration any item of loss, whether covered by the pleadings, or not.

Instruction 6. That the plaintiff has not complied with section 982 of the Political Code, prior to the filing of suit on the bond. Also plaintiff has not shown that any loss or damage was established by the Superior Court. In fact, the presumption is to the contrary. [112]

Instruction 7. No goodwill has been shown. On the contrary, it is shown that there was bad will, that there was a loss. Furthermore, the question of damages is purely speculative.

Instruction 8. No profits are shown to have been lost, and the instruction on that matter is purely speculative.

Instruction 9 involves an unliquidated claim and interest is not involved.

The COURT.—Instruction 9 was refused.

Mr. ALEXANDER.—That may be, your Honor. As I say, it is very hard to follow these instructions.

The COURT.—No. 10 was refused.

Mr. ALEXANDER.—Interest is not involved in this case, if any damages are involved.

Instruction 11. Attorney's fees should not be allowed, because it appears that the receiver was out in a day, and that any services rendered were on other matters.

The COURT.—There are two instructions given by the Court taking the place of 9 and 10.

Mr. ALEXANDER.—I also take exception to those as a matter of form, your Honor, and with

bond. Also, plaintiff has not shown that any loss or damages was established by the Superior Court.

VII.

No goodwill of the business has been shown. [114] Furthermore, it involves damages which are purely speculative.

VIII.

No profits have been shown to have been lost and this instruction is on matters that are purely speculative.

IX.

This is an unliquidated claim and interest is not allowed upon it. Furthermore, the bond is only for $5,000.00, and this would allow recovery in excess of the face of the bond.

X.

Interest should not be allowed as this is an unliquidated claim. Furthermore, the allowance of interest would increase the penalty of the bond to an amount beyond its face.

Furthermore, the damage, if any, did not all accrue on the 30th of June, 1925, the date from which it is stated that interest should be allowed.

XI.

Attorney fees should not be allowed in this case, as such fees are not covered by the bond.

REDMAN & ALEXANDER,
Attorneys for Defendant.

After being instructed as aforesaid, the jury retired for deliberation and thereafter and on the 4th day of April, 1929, a verdict for plaintiff in the sum of $6,300.00 was given.

Within ten days after the rendition of said verdict, and the entry of judgment therein, the defendant duly served and filed its notice of intention to move for a new trial, and its motion for a new trial, which notice of intention and motion are in words and figures as follows: [115]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 18,064.

A. G. COL COMPANY, INC., a Corporation,
Plaintiff,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation,
Defendant.

NOTICE OF INTENTION TO MOVE FOR A NEW TRIAL.

To the Above-entitled Court and to the Clerk Thereof; and to the Above Named Plaintiff, and to Messrs. Simeon E. Sheffey and/or Alden Ames, Its Attorneys; and to All Other Interested Parties and Their Attorneys:

Notice is hereby given to you and to each of you that the defendant Fidelity and Deposit Company

of Maryland, a corporation, intends to move the above-entitled Court for an order vacating and setting aside the verdict of the jury herein on the 4th day of April, 1929, and the judgment entered thereon, and to grant a new trial of the above-entitled action upon the following grounds:

1. Insufficiency of the evidence to justify the verdict.

2. That said verdict is against the law.

3. Errors in law occurring at the trial and excepted to by the defendant.

4. Excessive damages appearing to have been given under the influence of passion and prejudice.

5. Irregularity in the proceedings of the plaintiff by which the defendant was prevented from having a fair trial.

6. Orders of the Court by which defendant was prevented from having a fair trial.

7. Accident or surprise which ordinary prudence could not have guarded against.

8. Irregularity in the proceedings of the jury by which the defendant was prevented from having a fair trial.

9. Misconduct of the jury.

10. Misconduct of the jury, that one or more of the jurors were induced to assent to the verdict by a resort to the determination of chance. [116]

11. Irregularities in the proceedings of the Court by which the defendant was prevented from having a fair trial.

12. Newly discovered evidence material to the

defendant which could not with reasonable diligence have been discovered and produced at the trial.

That said motion as to all of the aforesaid grounds will be made upon the minutes of the court, and also upon affidavits.

REDMAN & ALEXANDER,
Attorneys for Defendant.

MOTION OF DEFENDANT FOR A NEW TRIAL.

To the Above-entitled Court and to the Clerk Thereof; and to the Above-named Plaintiff, and to Messrs. Simeon E. Sheffey and/or Alden Ames, Its Attorneys; and to All Other Interested Parties and Their Attorneys:

Comes now the defendant Fidelity and Deposit Company of Maryland, a corporation, and moves the above-entitled Court for an order vacating and setting aside the verdict of the jury herein on the 4th day of April, 1929, and the judgment entered thereon, and granting a new trial of the above-entitled action upon the following grounds:

1. Insufficiency of the evidence to justify the verdict.

2. That said verdict is against law.

3. Errors in law occurring at the trial and excepted to by the defendant.

4. Excessive damages appearing to have been given under the influence of passion and prejudice.

5. Irregularity in the proceedings of the plaintiff by which the defendant was prevented from having a fair trial.

6. Orders of the Court by which defendant was prevented from having a fair trial.

7. Accident or surprise which ordinary prudence could not have guarded against.

8. Irregularity in the proceedings of the jury by which the defendant was prevented from having a fair trial.

9. Misconduct of the jury; that one or more of the jurors were induced to assent to the verdict by a resort to the determination of chance. [117]

11. Irregularities in the proceedings of the Court by which the defendant was prevented from having a fair trial.

12. Newly discovered evidence material to the defendant which could not with reasonable diligence have been discovered and produced at the trial.

That said motion will be made upon the minutes of the Court, and also upon affidavits.

REDMAN & ALEXANDER,
Attorneys for Defendant.

That thereafter and on the 29th day of April, 1929, said motion for a new trial came on regularly for hearing, and was argued, whereupon the Court made the following order entered in the minutes of the Court:

"Mon., April 29, 1929.

After hearing attorneys for respective parties, IT IS ORDERED that the motion for a new trial be granted, unless plaintiff within five days, in writing, consents to the amount of judgment herein being reduced from the sum of $6300 to $5200 with costs."

That within five days thereafter the plaintiff filed a consent to remit all in excess of $5,200 from the judgment.

Thereupon, and upon the 4th day of May, 1929, the Court made an order denying the defendant's motion for a new trial.

And now, and herein, and hereby the defendant specifies errors as set forth in said notice of intention and said motion for a new trial: [118]

DEFENDANT'S SPECIFICATIONS OF PARTICULARS WHEREIN THE EVIDENCE IS INSUFFICIENT TO JUSTIFY THE VERDICT.

1. The evidence is insufficient to justify the verdict in that it does not appear therefrom, nor is there any evidence, that the plaintiff had a large income from its business, or any profits therefrom, or that said business was a growing or a prosperous one.

2. The evidence is insufficient to justify the verdict in that it does not appear therefrom, nor is there any evidence that the bond or undertaking, a copy of which is attached to the complaint and marked Exhibit "B," was given for any consideration, and that the consideration for the same failed, in that the Court had no jurisdiction to make the order appointing A. G. Col as receiver, or to direct the bond to be given by him.

3. The evidence is insufficient to justify the verdict in that it does not appear therefrom, nor is there any evidence, that the order appointing A. G.

Col as receiver was made by the Court, in that it appears that the Court purporting to appoint A. G. Col as receiver had no jurisdiction to appoint him as receiver, or to require the giving of any bond, and that no applicant's bond was filed prior to the order appointing A. G. Col as receiver.

4. The evidence is insufficient to justify the verdict in that it does not appear threfrom, nor is there any evidence, that A. G. Col took possession of the said property or business as receiver, in that the order purporting to appoint him as receiver was void for want of jurisdiction of the Court.

5. The evidence is insufficient to justify the verdict in that it does not appear therefrom, nor is there any evidence, that the California Sweet Potato Corporation did wrongfully or [119] without sufficient cause procure the appointment of A. G. Col as receiver, in that the court order was a void one for lack of jurisdiction.

6. The evidence is insufficient to justify the verdict in that it does not appear therefrom, nor is there any evidence, that plaintiff lost profits in the sum of $5,000.00, or in any sum.

7. The evidence is insufficient to justify the verdict in that it does nor appear therefrom, nor is there any evidence, that plaintiff lost credit or goodwill in the sum of $5,000.00, or in any sum.

8. The evidence is insufficient to justify the verdict in that it does not appear therefrom, nor is there any evidence, that plaintiff was compelled to or did pay the sum of $1,500.00, or any sum, as necessary or any costs or expenses to procure the

vacation or annulment of the appointment of a receiver, either for attorney's fees or otherwise; or that it was compelled to or did pay the sum of $250.00 or any sum for costs or expenses, or that said sums were or are reasonable in amount.

9. The evidence is insufficient to justify the verdict in that it does not appear therefrom, nor is there any evidence, that the bond sued upon constituted a valid or enforceable contract or undertaking or agreement.

DEFENDANT'S SPECIFICATIONS OF ERRORS.

1. Insufficiency of the evidence to justify the verdict as hereinabove set forth.

2. The giving of the instructions to which exceptions were taken by defendant, as hereinbefore set forth.

3. The refusal of the Court to give instructions requested by the defendant, as hereinbefore set forth. [120]

4. The refusal of the Court to grant the defendant's motion for a new trial.

5. The refusal of the Court to grant defendant's action for a directed verdict in favor of the defendant.

6. The refusal of the Court to refuse to allow a recovery upon the bond sued upon, in that it was void.

10. The admission in evidence of checks upon which payment was stopped.

11. Hearsay testimony given by witness Jewett

as to what the officers of the Bank of San Jose had stated after payment was stopped on the checks.

12. The refusal to allow the defendant to show that the order of the Superior Court, authorizing the above action, was made without notice.

13. The admission of Mr. Napoli's report as receiver, showing deposits from July 2d, 1925.

14. The refusal to admit the order of Judge Welch of July 3, 1925, discharging the receiver and exonerating him and the surety after that date.

15. The refusal to admit the order of Judge Welch of July 3, 1925, approving the account of Mr. Col.

16. The refusal to admit Mr. Col's report to the Superior Court of Santa Clara County, which was approved July 3d, 1925. [121]

17. The admission by the Court of the order purporting to allow the plaintiff to file this suit against the defendant upon *ex parte* application of plaintiff.

18. The refusal of the Court to allow the defendant to show that A. G. Col had accounted as a receiver and that his accounts had been accepted by the Superior Court and approved, and that an order had been made discharging A. G. Col as receiver and exonerating the surety upon his bond.

19. The admission of evidence regarding the actions of persons to whom the checks were payable, and upon which payment had been stopped.

The foregoing constitutes all of the proceedings had, and all of the testimony taken, and evidence

offered and received on the trial of said action, and all matters proved on said trial.

Now, within the time required by law, and the rules of this court, the said defendant proposes the foregoing as and for its bill of exceptions in this case, and prays that the same may be settled, allowed, signed, and certified as provided by law.

REDMAN & ALEXANDER,
Attorneys for Defendant. [122]

STIPULATION TO THE FOREGOING AS THE BILL OF EXCEPTIONS IN THE ABOVE-ENTITLED ACTION AND TO THE CORRECTNESS OF SAME.

IT IS HEREBY STIPULATED that the foregoing bill of exceptions is correctly engrossed, is true and correct, and that the same may be settled and allowed as the defendant's bill of exceptions on the appeal from the judgment in the above-entitled action.

Dated: July 5th, 1929.

SIMEON E. SHEFFEY,
Attorney for Plaintiff.
REDMAN & ALEXANDER,
Attorneys for Defendant.

ORDER SETTLING, CERTIFYING AND ALLOWING BILL OF EXCEPTIONS.

The attached and foregoing bill of exceptions, now being presented in due time, and found to be correct, I do hereby certify that the said bill is a full, true and correct bill of exceptions in the above-

entitled action, and that the recitals therein regarding the evidence are true and correct, and that the same is accordingly hereby approved, settled, certified and allowed.

Dated: July 6th, 1929.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed July 6, 1929. [123]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable FRANK H. KERRIGAN, Judge of the United States District Court:

The above-named defendant Fidelity and Deposit Company of Maryland, a corporation, feeling aggrieved by the verdict rendered in this court on the 4th day of April, 1929, and the judgment entered therein on the 4th day of April, 1929, in favor of the plaintiff, which judgment was in the sum of $6,300.00, together with costs, and which judgment plaintiff has consented to be reduced to the sum of $5,200.00 and costs, pursuant to an order of the Court following the hearing of the motion for a new trial, does hereby appeal from the judgment and from the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, for the reasons set forth in the assignment of errors filed

herewith, and said Fidelity and Deposit Company of Maryland prays that its plea be allowed and that citation be issued as provided by law, and that a transcript of the [124] record, proceedings and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of such court in such case made and provided.

And your petitioner further prays that all further proceedings be suspended, stayed and superseded until the determination of said appeal by said United States Circuit Court of Appeals, and that the proper order relating to and fixing the amount of security to be required of it be made.

And your petitioner will ever pray, etc.

Dated: San Francisco, June 13th, 1929.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Defendant.

REDMAN, ALEXANDER & BACON.
REDMAN & ALEXANDER,
Attorneys for Defendant.

Receipt of copy of the within petition for appeal admitted this 14th day of June, 1929.

SIMEON E. SHEFFEY,
ALDEN AMES,
Attorneys for Plaintiff.

[Endorsed]: Filed June 14th, 1929. [125]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the defendant Fidelity and Deposit Company of Maryland, a corporation, and contends that in the record, verdict, decision, final judgment and orders in said cause there has been manifest and material error, and in connection with and as part of its appeal herein makes and files the following assignenmt of errors on which it will rely in the prosecution of its appeal in said cause.

I.

The Court erred in refusing each of the following instructions which were requested by the defendant:

1. I instruct you to return a verdict in favor of the defendant. Taylor vs. Exnicious, 197 Cal. 443.

2. The Superior Court of Santa Clara County did not have any authority to appoint a stockholder of the California Sweet Potato Company as its receiver. If you find that Mr. A. G. Col was a stockholder in the California Sweet Potato Company at the time the Court appointed him the receiver of that corporation, [126] then the order appointing him was void. And if the order was void, the plaintiff in this action cannot maintain any action upon the bond, and your verdict should be in favor of the defendant Fidelity and Deposit Company of Maryland. Code of Civil Procedure of California, Section 566; Taylor vs. Exnicious, 197 Cal. 443.

3. If you find that the order appointing Mr. A. G. Col the receiver of the California Sweet Potato Company was annulled by the Supreme Court of the State of California because the Superior Court had no authority to appoint Mr. Col receiver, then you must decide this case *case* in favor of the defendant, Fidelity and Deposit Company of Maryland, and no damages should be awarded against it. Taylor vs. Exnicious, 197 Cal. 443.

4. If you find that the appointment of A. G. Col as receiver was not made wrongfully or maliciously or without just cause, and if you also find that Mr. Col faithfully performed all of his duties as receiver, then you must decide the case in favor of the defendant Fidelity and Deposit Company of Maryland, and you cannot award any damages to the plaintiff A. G. Col Company, Inc.

5. I instruct you that you cannot award any damages in this case merely because Mr. Col was appointed to the office of receiver. Unless you find that the appointment of Mr. Col as receiver was procured wrongfully or maliciously or without just cause, or unless you find that Mr. Col did not faithfully perform all of the duties of his office as receiver, then your verdict must be in favor of the defendant Fidelity and Deposit Company of Maryland, and you cannot award any damages to the plaintiff A. G. Col Company, Inc.

6. If you find that the plaintiff A. G. Col Company, Inc., [127] did not sustain any loss or damage by reason of the receivership of Mr. A. G. Col, then this is a complete exoneration of the de-

fendant Fidelity and Deposit Company of Maryland, and your verdict should be in its favor.

7. It is immaterial whether any damage was caused by the appointment of Joseph P. Napoli as receiver, for that issue is not involved in this case. If no damage to plaintiff corporation was caused by the appointment of Mr. Col as receiver, then no damages can be recovered by the plaintiff in this case, and your verdict should be in favor of the defendant Fidelity and Deposit Company of Maryland.

8. If you find that Mr. A. G. Col's accounts were examined by the Superior Court of the State of California, in and for the county of Santa Clara, and if you also find that his Honor, Judge J. R. Welch, Judge of the Superior Court of Santa Clara County, made an order finding that Mr. Col's accounts were true and correct in all respects, then you must accept this finding to be the fact. That is to say, if Judge Welch found Mr. Col's accounts to be true and correct, you must accept that finding as being a true one.

9. I instruct you that on the 3d day of July, 1925, the Superior Court of the State of California, in and for the county of Santa Clara, made an order exonerating the defendant Fidelity and Deposit Company of Maryland from all liability subsequent to that date. Therefore, you cannot award any damages to the plaintiff in this action which may have been sustained after the 3d day of July, 1925.

10. I instruct you that on the 3d day of July, 1925, his Honor, J. R. Welch, Judge of the Supe-

rior Court of the State of California, in and for the county of Santa Clara, made an order approving the report and accounts of Mr. Col, which order reads [128] as follows:

"Upon examining and filing the report of A. G. Col as receiver in the above entitled action, and it appearing to the court that said report is true and correct in all respects, and that Joseph P. Napoli has qualified as receiver, and is now in possession of said property, and has assumed the payment of any small items, of expense incurred by said A. G. Col, and that said A. G. Col has waived all compensation as receiver herein, and that it is proper that he be formally discharged and his surety exonerated,

NOW, THEREFORE, it is hereby ordered that said A. G. Col, pursuant to stipulations referred to in his report and the order of court heretofore filed herein, be and he is hereby discharged and relieved from any further duties and responsibilities herein and his surety exonerated.

Dated: July 3d, 1925.

J. R. WELCH,
Judge."

You must accept this order of Judge Welch as true and correct in all respects, and binding upon plaintiff in this action.

11. If the Superior Court of Santa Clara County did not have jurisdiction to make an order appointing Mr. A. G. Col as receiver, then the bond sued upon in this case is null and void and you must not award any damages against the defendant Fidelity and Deposit Company of Maryland, for under such

circumstances your verdict should be in its favor. Taylor vs. Exnicious, 197 Cal. 443.

12. If you find that the plaintiff A. G. Col Company, Inc., did not sustain any loss of profits by reason of Mr. Col's receivership, then you must not award any damages for the loss of profits.

13. If you find that A. G. Col Company, Inc., did not lose any credit or goodwill of its business by reason of Mr. Col's receivership, then I instruct you that you cannot award any damages for loss of credit or goodwill. [129]

14. If you find that the Court appointing Mr. Col. as receiver had no jurisdiction or legal power to do so, then I instruct you that the alleged bond sued upon was and is null and void and the plaintiff is not entitled to recover any damages upon it, and your verdict in such case must be in favor of the defendant Fidelity and Deposit Company of Maryland.

15. I instruct you that a suit cannot be maintained upon the bond in this case unless the plaintiff previously secured an order from the Superior Court of California permitting the action to be brought. It is not sufficient for the plaintiff to have an order signed by a Judge of the Superior Court. For such order would not be valid unless the Fidelity and Deposit Company of Maryland had notice that the plaintiff intended to apply for such an order or was present when the order was made and had an opportunity to be heard. But if you find that the order was procured in the absence of the defendant Fidelity and Deposit Company of Maryland, and

if you also find that the Fidelity and Deposit Company of Maryland did not have any notice of the time and place when such order would be applied for, then the order is void. And if you find that the order is void for want of such notice, then you must decide the case against the plaintiff, and you cannot award it any damages in this action. Thompson vs. Superior Court, 119 Cal. 538, at 543; McClatchy vs. Superior Court, 119 Cal. 413, at 418–421; Political Code, Section 982; 46 C. J. 552.

16. In this action, you are not concerned with any damages which may have been caused by Mr. Napoli's receivership. Therefore, in deciding whether any damages were caused by Mr. Col's receivership, you must eliminate from consideration the damages, if any, caused by Mr. Napoli's receivership. [130]

II.

The Court erred in giving each of the following instructions:

1. You are also instructed that it has been decided by the Supreme Court of the State of California, whose decision is final on that point, that said receiver was wrongfully appointed. Therefore, it is not incumbent upon you to go into the question as to whether or not the appointment was wrongful.

2. You are instructed that there is only one issue in this matter for you to decide, and that is the amount of damage which plaintiff in this action suffered, if any, by reason of the wrongful appointment of the receiver for plaintiff's business.

3. The measure of damages, according to the law of the State of California, as applicable to this case, is the amount that will compensate the plaintiff for all detriment, if any, proximately caused by the wrongful act of procuring the appointment of a receiver for plaintiff's business.

4. In estimating the amount of damage you may take into consideration the loss of actual profits, the money actually paid out for attorney's fees and costs incident to procuring the discharge of A. C. Col as receiver, the loss of credit and goodwill of said business, and any other items of loss proven to have been suffered by the plaintiff by reason of the appointment of A. G. Col as receiver.

5. Those are some of the elements that you may take into consideration if you should find for the plaintiff and against the [131] defendant. And in this regard you may consider not only profits actually lost by plaintiff, but any profits which you believe that plaintiff reasonably would have made had not the receiver been appointed.

6. You are instructed that the bond which is the basis of this suit was executed by the defendant in form payable to the State of California, but you are instructed that plaintiff has done all things required by law necessary to authorize plaintiff to prosecute this action in its own name, and on its own behalf, as a party interested therein.

7. You are instructed that the goodwill of a business is the expectation of continued public patronage, and is property, transferable like any other property. Its loss, due to the wrongful act of an-

other may be the subject of damages, and if you find that plaintiff in this action has suffered loss of goodwill to its business by reason of the wrongful appointment of a receiver, plaintiff is entitled to as much damages as will compensate plaintiff for such loss of its goodwill.

8. You are further instructed that if you find that plaintiff was damaged by reason of the wrongful appointment of the receiver, that in addition to the damage plaintiff suffered by reason of such wrongful appointment, plaintiff may recover interest on such sums as were expended by plaintiff to procure the termination of the receivership of A. G. Col, including attorney's fees paid for that specific purpose, if any. Such interest is to be computed from the date of expenditure in question, at the rate of 7% per annum. [132]

9. You are instructed that the penalty of defendant's bond is the sum of $5,000. This is the limit of defendant's liability, if any, for damages, general or special, except, however, if you find that plaintiff has suffered damages equal to $5,000, then there may be added to defendant's liability interest at the rate of 7 per cent per annum on such sums as you may find that plaintiff expended to procure the termination of the receivership of A. G. Col from the date when such expenditures were made.

III.

The evidence was insufficient to justify the verdict in the following particulars:

1. The evidence is insufficient to justify the verdict in that it does not appear therefrom, nor is there any evidence, that the plaintiff had a large income from its business, or any profits therefrom, or that said business was a growing or a prosperous one.

2. The evidence is insufficient to justify the verdict in that it does not appear therefrom, nor is there any evidence that the bond or undertaking, a copy of which is attached to the complaint and marked Exhibit "B," was given for any consideration, and that the consideration for the same failed, in that the Court had no jurisdiction to make the order appointing A. G. Col as receiver, or to direct the bond to be given by him.

3. The evidence is insufficient to justify the verdict in that it does not appear therefrom, nor is there any evidence, [133] that the order appointing A. G. Col as receiver was made by the Court, in that it appears that the Court purporting to appoint A. G. Col as receiver had no jurisdiction to appoint him as receiver, or to require the giving of any bond, and that no applicant's bond was filed to the order appointing A. G. Col as receiver.

4. The evidence is insufficient to justify the verdict in that it does not appear therefrom, nor is there any evidence, that A. G. Col took possession of the said property or business as receiver, in that the order purporting to appoint him as receiver was void for want of jurisdiction of the Court.

5. The evidence is insufficient to justify the verdict in that it does not appear therefrom, nor is

there any evidence, that the California Sweet Potato Corporation did wrongfully or without sufficient cause procure the appointment of A. G. Col as receiver, in that the Court order was a void one for lack of jurisdiction.

6. The evidence is insufficient to justify the verdict in that it does not appear therefrom, nor is there any evidence, that plaintiff lost profits in the sum of $5,000.00, or in any sum.

7. The evidence is insufficient to justify the verdict in that it does not appear therefrom, nor is there any evidence, that plaintiff lost credit or goodwill in the sum of $5,000.00, or in any sum.

8. The evidence is insufficient to justify the verdict in that it does not appear therefrom, nor is there any evidence, that plaintiff was compelled to or did pay the sum of $1,500.00, or any sum, as necessary or any any costs or expenses to procure the vacation or annulment of the appointment of a receiver, either for attorney's fees or otherwise; or that it was compelled to or [134] did pay the sum of $250.00 or any sum for costs or expenses, or that said sums were or are reasonable in amount.

9. The evidence is insufficient to justify the verdict in that it does not appear therefrom, nor is there any evidence, that the bond sued upon constituted a valid or enforceable contract or undertaking or agreement.

IV.

1. The Court erred in refusing to grant the defendant's motion for a new trial.

2. The Court erred in refusing to grant the defendant's motion for a directed verdict.

3. The Court erred in allowing a recovery upon the bond sued upon, in that it was void.

4. The Court erred in admitting the minute-books of the A. G. Col Company.

5. The Court erred in admitting the minute-books of the A. G. Col Company, Inc.

6. The Court erred in admitting documents of transfer from one corporation to the other, in that E. D. Bronson, Jr., was a director in both corporations.

7. The Court erred in admitting testimony that the receiver A. G. Col had stopped payment upon outstanding checks. [135]

8. The Court erred in admitting in evidence the checks upon which payment was stopped.

9. The Court erred in admitting testimony showing the actions of the persons to whom the checks were payable.

10. The Court erred in admitting hearsay testimony given by the witness J. C. Jewett regarding statements made by the officers of the Bank of San Jose after payment had been stopped upon the checks.

11. The Court erred in refusing to allow the defendant to show that the order of the Superior Court purporting to authorize plaintiff to file the above action was made without notice to the defendant.

12. The Court erred in admitting the report of

Joseph P. Napoli as receiver, and showing his deposits in the bank.

13. The Court erred in refusing to admit the order of Judge Welch, dated July 3d, 1925, discharging A. G. Col as receiver, and exonerating him and the surety after that date.

14. The Court erred in refusing to admit the order of Judge Welch, dated July 3d, 1925, approving the account of A. G. Col as receiver.

15. The Court erred in refusing to admit A. G. Col's report to the Superior Court of Santa Clara County, as receiver, which was approved July 3d, 1925. [136]

16. The Court erred in admitting the order of the Superior Court purporting to allow the plaintiff to file this suit against the defendant upon the *ex parte* application of the plaintiff.

17. The Court erred in refusing to allow the defendant to show that A. G. Col had accounted as a receiver, and that his accounts had been accepted by the Superior Court and had been approved.

18. The Court erred in allowing the case to go to the jury, in that the bond sued upon was void, and the jury should not have been perimtted to return a verdict based upon it.

19. The Court erred in permitting the witness J. C. Jewett to testify that there was publicity given to the fact of the appointment of a receiver in the San Jose newspapers.

20. The Court erred in allowing the plaintiff to introduce a profit and loss statement of the plaintiff for the year 1923.

21. The Court erred in permitting any recovery upon the bond sued upon, in that jurisdiction was lacking in the Superior Court to appoint A. G. Col as receiver, as he was a stockholder of the plaintiff, and also as no applicant's bond had been given.

22. The Court erred in admitting the bond in the following proceedings:

Mr. SHEFFEY.—For the purpose of the record, your Honor, may I make a formal offer of the copy of the bond [137] attached to the complaint, in lieu of the original bond? Mr. Alexander stipulates that that may be done.

Mr. ALEXANDER.—I would rather not say anything about a stipulation. I am sitting here saying nothing. Sometimes stipulations are misconstrued.

The COURT.—You do not deny that a copy of the bond attached to the complaint is a copy of the original?

Mr. ALEXANDER.—It is a true and correct copy of the original, and the original is now on file in the County Clerk's office in San Francisco, having been transferred to San Francisco on a change of venue from Santa Clara County.

The COURT.—Then the bond as attached to your complaint in this action is admitted in evidence.

23. The Court erred in admitting the following testimony:

Mr. SHEFFEY.—Q. You were doing business with the Bank of San Jose, were you not?

A. Yes.

Q. Did you have any agreement with the Bank of San Jose as to the credit limit of the A. G. Col Company, Inc.?

Mr. ALEXANDER.—We object to that as calling for the conclusion of the witness. If there is a document, let us have the document.

The COURT.—Yes, it does, but I will overrule the objection; exception.

Mr. SHEFFEY.—I mean prior to the 30th day of June, 1925.

A. I had a verbal agreement with the executives of the Bank of San Jose to extend me a $20,000 commercial account.

. At the time the receiver was appointed on the 30th day of June, 1925, how much had you borrowed on that commercial account?

A. $14,000, I believe, to be exact. [138]

Q. Approximately $14,000?

A. Approximately $14,000.

Q. After the receiver was appointed, did the bank threaten to call your loan?

A. The bank officials called me into conference, I believe it was the next day after the receivership, and told me that—

Mr. ALEXANDER.—Pardon me. We object to this as being hearsay, your Honor.

Mr. SHEFFEY.—You need not repeat what the bank officials said to you, but just answer my question, if they threatened to call your loan.

A. They threatened to call my loan.

24. The Court erred in the following proceed-

ings, when the witness A. G. Col was on the witness stand:

Q. I will ask you to look at this document. I am referring to a document marked "Filed in the Superior Court of Santa Clara County," in that action, No. 31,959, and marked "Report of A. G. Col as received," and ask you if that was your report which was filed. A. Yes.

Mr. ALEXANDER.—We will offer this in evidence and ask that it be deemed read in evidence.

Mr. SHEFFEY.—We object to that, because there is no showing that the report was furnished or given upon an opportunity for the corporation, the A. C. Col Company, Inc., to be heard. As a matter of fact, there was no such hearing. The account was presented to the Court without any opportunity to the corporation to be heard in the matter.

The COURT.—What bearing has it? [139]

Mr. ALEXANDER.—I am going to follow it up by presenting the order approving the account and exonerating the receiver and his surety from that date.

Mr. SHEFFEY.—I object to it as immaterial, irrelevant, and incompetent.

The COURT.—Objection sustained; exception.

Mr. ALEXANDER.—We ask to have it identified in the record, your Honor.

The COURT.—Very well.

The document offered in evidence and refused admission as testimony is in words and figures as follows:

In the Superior Court of the State of California in and for the County of Santa Clara.

No. 31,959.

CALIFORNIA SWEET POTATO CORPORATION, a Corporation,

Plaintiff,

vs.

L. E. BONTZ et al.,

Defendants.

REPORT OF A. G. COL AS RECEIVER.

To the Superior Court of the State of California in and for the county of Santa Clara:

The report of A. G. Col respectfully shows:

That on June 30, 1925, he was appointed by *ex parte* application receiver of the property and enterprise operated by the A. G. Col Company, Inc., on the west side of St. James Street, between Market and San Pedro Streets, in San Jose, California, and thereupon, and at the hour of about four o'clock P. M. he qualified and entered upon his duties as such receiver.

That with the assistance of the regular employees, he proceeded to take an inventory of the wares, goods and merchandise on hand at said plant and enterprise, and also employed an independent auditor to prepare a statement of the condition of the books of said corporation. [140]

That thereafter, and on July 1, 1925, about 11 o'clock A. M., he was served with subpoena in the

above-entitled court and caused to appear in said court at 2 o'clock P. M. on said July 1st, 1925, and testify in behalf of a motion then pending made by the defendants seeking to set aside the order appointing him as receiver.

In obedience to said subpoena, this receiver appeared in court at 2 o'clock on said July 1, 1925, and was present in court during all of the afternoon on said day, and during the course of said hearing, it was stipulated in open court that an order be made vacating and setting aside the order made on June 30, 1925, appointing him as receiver herein, and that Joseph P. Napoli be appointed receiver in said cause, and that immediate possession of said property be given said Joseph P. Napoli, upon the understanding that he would on the following day qualify and give a bond in the sum of $10,000.00.

That on July 2, 1925, said Joseph P. Napoli duly qualified as such receiver. In obedience to said stipulation and order of the Court made in harmony therewith, the undersigned, A. G. Col, turned over all of the property and assets and possession of said plant to Joseph P. Napoli, and on July 2, 1925, after his qualification as such receiver, took his receipt for same, which is hereto attached and made a part of this report.

That the following expenses have been incurred by the undersigned in connection with said appointment, namely:

Johnson & Temple, premium on temporary bond	$2.50
County Clerk, 2 copies of order of appointment	1.20
Sheriff's Office, San Jose, serving of order of appointment on J. C. Jewett, Manager of A. G. Col Co., Inc.	.75
Total	$4.45

Auditor's statement has not been completed, nor has his bill been presented. The plaintiff above named and Joseph P. Napoli have ~~been~~ reimbursed the undersigned respecting the above expenditures, and have assumed the payment of the account to the auditor.

That the undersigned waives all right to compensation for his services in this matter.

Wherefore, the undersigned prays that this report be approved and he be formally discharged as receiver and his bond exonerated.

A. G. COL,
Receiver.

Dated: July 3d, 1925. [141]

State of California,
County of Santa Clara,—ss.

A. G. Col, being first duly sworn, deposes and says:

That he is the receiver in the above and foregoing report; that he has read the same and that the same is true and correct in all respects and that it contains a true and correct statement of all

moneys received and paid out by him in any manner in connection with said receivership.

A. G. COL.

Subscribed and sworn to before me this 3d day of July, 1925.

N. E. WRETMAN,
Notary Public in and for the County of Santa Clara, State of California.

This is to certify that I am in possession of the plant of A. G. Col Company referred to and briefly described in the above and foregoing report; having received possession of same from A. G. Col, my predecessor as receiver, and I hereby assume the payment of the items mentioned and referred to in the above and foregoing report.

JOSEPH P. NAPOLI.

State of California,
County of Santa Clara,—ss.

On this 3d day of July, in the year one *thousand and* twenty-five, before me, N. E. Wretman, a notary public in and for the County of Santa Clara, State of California, residing therein, duly commissioned and sworn, personally appeared Joseph P. Napoli, and known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal at my office

in the said County of Santa Clara, the day and year in this certificate first above written.

[Seal] N. E. WRETMAN,

Notary Public in and for the County of Santa Clara, State of California.

My commission expires March 24, 1929.

Mr. ALEXANDER.—I offer in evidence the order of Judge Welch, under date of July 3, 1925, in that same action, approving the report of the receiver, accepting his account, and [142] exonerating him and his surety, that is the defendant in this action, from further responsibility.

Mr. SHEFFEY.—I renew my objection to that as immaterial, irrelevant, and incompetent, and I want the jury to be instructed to disregard Mr. Alexander's statement that it is an order exonerating the surety bond in this action.

The COURT.—As a matter of fact, it did exonerate the surety. It would be an exoneration as to any damages incurred thereafter. I do not know that it would affect this suit. You claim damages as the result of the wrongful appointment of a receiver. Any damage that was caused the plaintiff in this action on account of the wrongful appointment you would be entitled to recover, if there were any such damages. The jury will understand that the objection to this document is sustained, and an exception noted. Where evidence is offered and an objection is sustained and it is not admitted, it is not a proper subject matter for your attention and consideration; in other words, you are to disregard any inference that might be

drawn from the offer. It is not evidence, and is not to be considered by you.

The order of Judge Welch, under date of July 3, 1925, which was offered in evidence by the defendant and refused admission as evidence, is in words and figures as follows:

In the Superior Court of the State of California in and for the County of Santa Clara.

No. 31,959.

CALIFORNIA SWEET POTATO CORPORATION, a Corporation,

Plaintiff,

vs.

L. E. BONTZ et al.,

Defendants.

ORDER APPROVING REPORT AND DISCHARGE OF RECEIVER. [143]

Upon examining and filing the report of A. G. Col as receiver in the above-entitled action, and it appearing to the court that said report is true and correct in all respects, and that Joseph P. Napoli has qualified as receiver, and is now in possession of said property, and has assumed the payment of any small items of expense incurred by said A. G. Col, and that said A. G. Col has waived all compensation as receiver herein, and that it is proper that he be formally discharged and his surety exonerated.

NOW THEREFORE it is hereby ordered that said A. G. Col, pursuant to stipulations referred to in his report and the order of court theretofore filed herein, be and he is hereby discharged and relieved from any further duties and responsibilities herein and his surety exonerated.

J. R. WELCH,
Judge.

Dated: July 3d, 1925.

Oral exceptions to the instructions of the Court to the jury were taken by the defendant as follows:

Mr. ALEXANDER.—Complying with the rule, I am excepting to the instructions given at the request of the plaintiff.

Instruction 1 does not give the contents of the bond, it does not show that the bond is explicit.

Instruction 2. The decision of the Supreme Court does not relieve plaintiff from complying with the condition specified.

Instruction 3. There is more than one issue in this case, one is whether the applicant for the appointment of a receiver ever gave a bond. The only issue is not the question of damages.

Instruction 4. Assumes that Mr. Col procured the appointment of the receiver, whereas the record shows that he was not the applicant in the suit in which the receiver was appointed.

Instruction 5 allows the jury to take into consideration—

The COURT.—Just a moment. With reference to No. 4, I struck out a part of the proposed instruction. [144]

Mr. ALEXANDER.—It is difficult to follow it entirely, your Honor. I am doing the best I can under the rule. It is a hard rule to follow.

The COURT.—Yes, I know it is, but you have to do it to preserve your rights.

Mr. ALEXANDER.—Yes, your Honor.

Instruction 5 allows the jury to take into consideration any item of loss, whether covered by the pleadings, or not.

Instruction 6. That the plaintiff has not complied with section 982 of the Political Code, prior to the filing of suit on the bond. Also plaintiff has not shown that any loss or damage was established by the Superior Court. In fact, the presumption is to the contrary.

Instruction 7. No goodwill has been shown. On the contrary, it is shown that there was bad will, that there was a loss. Furthermore, the question of damages is purely speculative.

Instruction 8. No profits are shown to have been lost, and the instruction on that matter is purely speculative.

Instruction 9 involves an unliquidated claim and interest is not involved.

The COURT.—Instruction 9 was refused.

Mr. ALEXANDER.—That may be, your Honor. As I say, it is very hard to follow these instructions.

The COURT.—No. 10 was refused.

Mr. ALEXANDER.—Interest is not involved in this case, if any damages are involved.

Instruction 11. Attorney's fees should not be allowed, because it appears that the receiver was

out in a day, and that any services rendered were on other matters. [145]

The COURT.—There are two instructions given by the Court taking the place of 9 and 10.

Mr. ALEXANDER.—I also take exception to those as a matter of form, your Honor, and with every respect that I have for the Court. I have not been able to follow what your Honor gave of the defendant's proposed instructions, so that to protect my rights I except to the refusal of the Court to give each and every one of the instructions requested by defendant, numbered from 1 to 25, which I hope will cover it sufficiently.

The COURT.—The exceptions will be noted.

Said defendant excepted to plaintiff's Instruction No. 5, which is Paragraph 4 on page 6 herein, in that it allowed the jury to take into consideration any items of loss, whether covered by the pleadings, or not.

In addition to the oral exceptions to the giving of instructions, and to the refusal to give certain other instructions on behalf of defendant, said defendant prior to the time the jury retired served and filed and presented to the presiding Judge the following written exceptions to the instructions, viz.:

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 18,064.

A. G. COL COMPANY, INC., a Corporation,
Plaintiff,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation,
Defendant.

DEFENDANT'S EXCEPTIONS AND OBJECTIONS TO PLAINTIFF'S PROPOSED INSTRUCTIONS.

I.

This is objectionable because it assumes that the bond was a valid one. The bond was not valid. The Court had no jurisdiction to order it. [146]

II.

The decision of the Supreme Court does not save the plaintiff from proving the condition specified in the bond.

III.

There is more than one issue in this case. One of the issues in the case is whether the applicant for a receiver ever gave a bond. The only issue is not on the question of damages.

IV.

This instruction is erroneous. It assumes that

Mr. Col procured the appointment of the receiver. He was not the applicant in the suit in which a receiver was appointed.

V.

This allows the jury to take into account any item of loss, whether covered by the pleadings or not.

VI.

Plaintiff has not complied with Section 982 of the Political Code, prior to filing suit upon the bond. Also, plaintiff has not shown that any loss or damage was established by the Superior Court.

VII.

No goodwill of the business has been shown. Furthermore, it involved damages which are purely speculative.

VIII.

No profits have been shown to have been lost and this instruction is on matters that are purely speculative.

IX.

This is an unliquidated claim and interest is not allowed upon it. Furthermore, the bond is only for $5,000.00, and this would allow recovery in excess of the face of the bond.

X.

Interest should not be allowed as this is an unliquidated claim. Furthermore, the allowance of interest would increase the penalty of the bond to an amount beyond its face.

Furthermore, the damage, if any, did not all accrue on the 30th of June, 1925, the date from which it is stated that interest should be allowed.

XI.

Attorney fees should not be allowed in this case, as such fees are not covered by the bond.

REDMAN & ALEXANDER,
Attorneys for Defendant.

REDMAN & ALEXANDER,
REDMAN, ALEXANDER & BACON,
Attorneys for Defendant.

Receipt of copy of the within assignment of errors admitted this 14th day of June, 1929.

SIMEON E. SHEFFEY,
ALDEN AMES,
Attorneys for Plaintiff.

[Endorsed]: Filed June 14th, 1929. [147]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Upon motion of Messrs. Redman & Alexander, attorneys for the above-named petitioner and defendant Fidelity and Deposit Company of Maryland, a corporation, and upon filing the petition of said defendant for appeal;

IT IS ORDERED that an appeal be and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth

Circuit the judgment entered herein on the 4th day of April, 1929, in favor of plaintiff and against said defendant, and that the amount of the bond as required by law on said appeal be and the same is hereby fixed at the sum of $7,000.00, and said bond shall act as a supersedeas and cost bond, and execution shall be stayed pending the outcome of said appeal.

Dated: June 15th, 1929.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed Jun. 15, 1929. [148]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Fidelity and Deposit Company of Maryland, a corporation, as principal, and American Bonding Company of Baltimore, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and duly authorized to transact business and issue surety bonds in the State of California, as Surety, are held and firmly bound unto A. G. Col Company, Inc., a corporation, in the sum of seven thousand dollars, ($7,000.00), to be paid to the said A. G. Col Company, Inc., its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

SEALED with our seal and dated this 14th day of June, 1929.

WHEREAS, lately at a District Court of the United States for the Southern Division of the Northern District of California, Second Division, in a suit pending in said court between A. G. Col Company, Inc., a corporation, plaintiff, and Fidelity [149] and Deposit Company of Maryland, a corporation, defendant, a judgment was rendered against the said defendant on the 4th day of April, 1929, for the sum of $6,300.00, together with interest thereon and costs, and from which judgment plaintiff has remitted all sums in excess of $5,200.00 and taxable costs, pursuant to an order of the court made on the 4th day of May, 1929; and

WHEREAS, the said defendant, Fidelity and Deposit Company of Maryland, a corporation, having obtained from said court an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the aforesaid suit, and a citation directed to the said A. G. Col Company, Inc., citing and admonishing it to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California, according to law within thirty days from the date of said citation;

NOW, THEREFORE, the condition of this obligation is such that, if the said defendant, Fidelity and Deposit Company of Maryland, shall prosecute its said appeal to effect and satisfy the judgment against it and answer all damages and costs if it

fail to make its plea good, then the above obligation shall be void; otherwise, to remain in full force and effect.

And further the undersigned surety agrees that in case of a breach of any condition hereof, the above-entitled court may, upon notice to the undersigned American Bonding Company of Baltimore of not less than ten (10) days, proceed summarily in the above-entitled cause to ascertain the amount which said American Bonding Company of Baltimore is bound to pay on account of such breach and render judgment therefor against it and award execution thereof, not exceeding, however, the sums specified [150] in this undertaking.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

By B. H. BERDAN,
Its Attorney-in-fact.

Attest: GUERTIN CARROLL,
Agent.

AMERICAN BONDING COMPANY OF BALTIMORE.

By E. W. SWINGLEY,
Its Attorney-in-fact.

Attest: S. C. SIMS,
Agent.

The within and foregoing bond on appeal is hereby approved, both as to sufficiency and form.

Dated: June 15th, 1929.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed Jun. 15, 1929. [151]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

Please prepare record on appeal in the above-entitled cause, and include therein the following:

Complaint, filed December 21, 1927.

Defendant's demurrer and motion to make complaint more definite and certain, filed Jan. 3, 1928.

April 12, 1928—Order overruling demurrer to complaint, and denying motion to make complaint more definite and certain.

Defendant's amended answer, filed June 15, 1928.

April 4, 1929—Order denying defendant's motion for directed verdict.

Verdict of the jury rendered April 4, 1929.

Judgment on the verdict entered April 4, 1929.

Defendant's notice of intention to move for a new trial, filed April 13, 1929.

Minute order of Court made on April 29, 1929, following motion for a new trial. [152]

May 4, 1929—Plaintiff's consent to remit part of verdict.

Order of Court dated May 4, 1929, denying motion for a new trial, and reducing the amount of the judgment to $5200.00.

Bill of exceptions.

Petition for appeal.

Citation on appeal.

Assignment of errors.
Order allowing appeal.
Bond on appeal.
This praecipe.

Dated: July 6th, 1929.

REDMAN & ALEXANDER,
REDMAN, ALEXANDER & BACON,
Attorneys for Defendant.

[Endorsed]: Filed July 6, 1929. [153]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 153 pages, numbered from 1 to 153, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said court, and that the same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $72.50; that the said amount was paid by the defendant and that the original citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 7th day of August, A. D. 1929.

[Seal] WALTER B. MALING,

Clerk United States District Court for the Northern District of California.

By Harry T. Fouts,

Deputy Clerk, U. S. District Court Northern District of California. [154]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to A. G. COL COMPANY, Inc., a Corporation, and SIMEON E. SHEFFEY, Esq., and ALDEN AMES, Esq., Its Attorneys, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, wherein A. G. Col Company, Inc., a Corporation, was plaintiff and Fidelity and Deposit Company of Maryland, a corporation, was defendant, and wherein Fidelity and Deposit Company of Maryland is appellant, and you are appellee, to show cause, if any there be, why the decree rendered

against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the Northern District of California, this 15th day of June, A. D. 1929.

FRANK H. KERRIGAN,
United States District Judge.

Receipt of the within citation on appeal is acknowledged this 17th day of May, 1929.

SIMEON E. SHEFFEY, and
ALDEN AMES,
Attorneys for Plaintiff.

[Endorsed]: Filed Jun. 19, 1929. [155]

[Endorsed]: No. 5906. United States Circuit Court of Appeals for the Ninth Circuit. Fidelity and Deposit Company of Maryland, a Corporation, Appellant, vs. A. G. Col Company, Inc., a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed August 7, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Frank H. Schmid,
Deputy Clerk.